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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

M. K. Sivagaminatha Pillai .. *Appellant**

v.

K. Nataraja Pillai and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 13—*Foreign judgment—When conclusive and binding.*

A decree of a foreign Court, even if passed *ex parte* will be binding on the parties thereto and will be conclusive under section 13 of the Civil Procedure Code, if evidence was taken and the decision was given by the foreign Court on a consideration of the evidence. Where the decree of the foreign Court was passed as a matter of course as a result of the default of the defendant in furnishing security and filing an answer as directed, it is not one given on merits and will not be conclusive.

Appeal against the decree of the Court of the Subordinate Judge of Tirunelveli, dated 31st October, 1950 and passed in Original Suit No. 81 of 1955.

M. Natesan, for Appellant.

M. S. Venkatarama Ayyar and *V. Krishnan*, for Respondents.

The Judgment of the Court was delivered by

Kailasam, J.—The plaintiff (appellant herein) filed a suit before the Subordinate Judge of Tirunelveli for recovery of Rs. 12,537-11-11 based upon a foreign judgment obtained by the plaintiff in the District Court, Colombo. The plaintiff and his mother Kuppammal were trading as partners under the name and style of 'M. K. Sivagaminathan', in Princess Street, Bombay. Defendants 1 and 2 were carrying on business in partnership in Colombo under the name and style of 'Jayalakshmi and Company'. Defendants 1 and 2 borrowed from the plaintiff several sums under hundis drawn on the defendants and made payable thirty days after sight to the order of the Indian Overseas Bank, Ltd., Colombo. Defendants 1 and 2 accepted to pay the amount due under these hundies but failed to pay when they were presented to them on the due dates.

The plaintiff and his mother filed a suit No. 15437/S on 7th October, 1953, in the District Court at Colombo for recovery of Rs. 10,671-35 cents. Summons were issued to defendants 1 and 2 and they accepted the summons. Defendants 1 and 2 filed proxy through their Proctor and moved for the grant of leave to appear and defend the action unconditionally. The Additional District Judge, Colombo, passed an order on 8th December, 1953, holding that the defendants were *prima facie* liable in respect of the bills and observed that he was not satisfied with the *bona fides* of the

* Appeal No. 112 of 1957.

12th December, 1960.
(21st Agrahayana, 1882, Saka).

defence raised by the 1st defendant. The Court ordered the 1st defendant to give security in the sum of Rs. 7,000 as a condition of filing answer and granted time for security and answer till 21st December, 1953. It may be noted that though the 2nd defendant received the summons he remained *ex parte*. The 1st defendant failed to furnish security on the due date and on the application of the plaintiff judgment was entered in favour of the plaintiff on 21st December, 1953. On 2nd February, 1954, the 1st defendant applied for stay of execution proceedings and submitted that on the 17th December, he had filed a petition of appeal against the order directing him to give security as a condition for filing answer. The learned Additional District Judge of Colombo directed execution to be stayed on the 1st defendant furnishing security for Rs. 7,000 and granted time till 27th February, 1954. The 1st defendant did not furnish any security. The 1st defendant filed an appeal to the Supreme Court of Colombo and the Supreme Court by an order dated 7th October, 1954, dismissed the appeal. The plaintiff applied for execution of the decree but could not realise the amount from the defendants.

The plaintiff filed the present suit before the Subordinate Judge of Tirunelveli based on the judgment of the District Court, Colombo. The defendants raised various contentions and resisted the suit. The learned Subordinate Judge dismissed the suit. The lower Court found that the plaintiff has not proved that the judgment of the Colombo Court in S. No. 15437/S dated 21st December, 1953, is conclusive on the matter arising for adjudication between the parties.

In the appeal before us the learned counsel for the appellant contended that the judgment in No. 15437/S, District Court, Colombo, is a foreign judgment on merits and the Subordinate Judge ought to have given a decree on that judgment. The main contention put forward by the learned counsel for the respondent is that the judgment of the Colombo Court is in the nature of an order for default and it was not given on the merits of the case.

According to the procedure prevailing before the District Court, Colombo, action on a cause for a debt due on a promissory note is instituted by presenting a plaint in the form prescribed. The procedure to be followed in the Civil Courts in Ceylon is governed by the Civil Procedure Code of Ceylon. Section 7 of the Civil Procedure Code of Ceylon runs as follows :—

" The procedure of an action may be either regular or summary."

Illustrations.

" In actions of which the procedure is regular, the person against whom the application is made is called upon to formally state his answer to the case which is alleged against him in the application before any question of fact is entertained by the Court, or its discretion thereon is in any degree exercised.

In actions of which the procedure is summary, the applicant simultaneously with preferring his application supports with proper evidence the statement of fact made therein ; and if the Court in its discretion considers that a *prima facie* case is thus made out—

" (*a*) either the order sought is immediately passed against the defendant before he has been afforded an opportunity of opposing it, but subject to the expressed qualification that it will only take effect in the event of his not showing any good cause against it on a day appointed therein for the purpose ;

(*b*) or a day is appointed by the Court for entertaining the matter of the application on the evidence furnished, and notice is given to the defendant that he will be heard in opposition to it on that day if he thinks proper to come before the Court for that purpose."

Chapter LIII, sections 703, 704, 705 and 706 are the relevant rules governing the summary procedure. Section 704 (1) provides that in any case in which the plaint and summons are in the prescribed form, the defendant shall not appear or defend the action, unless he obtains leave from the Court to appear and defend ; and in default of his obtaining such leave the plaintiff shall be entitled to a decree. This section also provides that the defendant shall not be required to give security unless the Court thinks his defence not to be *prima facie* sustainable, or feels reasonable doubt as to its good faith. Section 705 provides that the plaintiff who sues and obtains such summons must on presenting the plaint produce to the Court the

instrument on which he sues, and he must make the affidavit that the sum which he claims is justly due to him from the defendant thereon, and that if the instrument appears to the Court to be properly stamped, and not to be open to suspicion by reason of any alteration or erasure or other matter on the face of it, and not to be barred by prescription, the Court may in its discretion make an order for the service on the defendant of the summons above mentioned. Section 706 provides that the Court shall, upon application by the defendant, give leave to appear and defend the action on such terms as the Court thinks fit, if the defendant discloses a defence or facts which would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

In this case the proceedings of the District Court of Colombo is found in Exhibit A-1, a certified copy of the decree and judgment in No. 15437/S. After the filing of the plaint summons was issued. In the records we do not find a copy of any affidavit by the plaintiff stating that the sum which he claimed is justly due to him from the defendants as required under section 705. The 1st defendant had filed an affidavit praying for leave to appear and defend the action unconditionally. In that statement he denied that he was carrying on business in partnership with the second defendant and contended that he was not aware whether the bills were duly accepted and that there was no consideration for acceptance of the bills. The leave prayed for was not granted as the learned Additional District Judge was not satisfied with the *bona fides* of the defence and therefore ordered the 1st defendant to give security in a sum of Rs. 7,000 as a condition for filing answer. As the defendant did not file an answer or furnish security, the Court entered judgment for the plaintiff as prayed for.

It has now to be considered whether the judgment passed by the Colombo District Court is a foreign judgment enforceable by the Courts in India. The learned counsel for the 1st respondent contends that the judgment was not given on merits, and that by reason of section 13 (*b*) of the Civil Procedure Code it is not conclusive. The leading case on the subject is given by the Privy Council in *Keymer* v. *Viswanotham Reddi*[1]. In that case the plaintiff sued the defendant in the Court of King's Bench in London for a sum of money alleging it to be due to him in respect of transactions he had with the defendant as a member of a firm in Madras who under arrangements between them consigned goods to the plaintiff for sale in London. The defendant denied liability and refused to answer interrogatories which the plaintiff was allowed to exhibit and thereupon the defence was struck out and the defendant was ordered to be placed in the same position as if he had defended and judgment was entered for the plaintiff. A suit was brought in the Madras High Court on that judgment. This matter was taken up to the Privy Council and their Lordships observed :

"In point of fact what happened was that, because the defendant refused to answer the interrogatories which had been submitted to him, the merits of the case were never investigated and his defence was struck out. He was treated as though he had not defended, and judgment was given upon that footing. It appears to their Lordships that no such decision as that can be regarded as a decision given on the merits of the case within the meaning of section 13 (*b*)."

The above decision of the Privy Council was followed in a Full Bench decision of the Madras High Court in *Mahomed Kassim & Co.* v. *Seeni Pakir Bin Ahmed*[2]. That case arose out of a suit brought by the plaintiff in the Sub-Court of Ramnad on a judgment of the Supreme Court of Penang obtained by him against the defendants. At the hearing of the suit, in Penang the defendants did not appear in Court to contest it. They were declared to have been properly served and in accordance with the rule of procedure of that Court by which in suits in which defendants being properly served, do not appear and contest, judgment was given for the plaint-claim without any trial. The Full Bench held that the case was governed by the decision in *Keymer* v. *Viswanatham Reddi*[1], and they were bound by it. Krishnan, J., observes that the case is clearly one where the decision was given without any evidence at

1. (1916) 32 M.L.J. 35 : L.R. 44 I.A. 6 : I.L.R. 40 Mad. 112 (P.C.).

2. (1926) 52 M.L.J. 240 : I.L.R. 50 Mad. 261.

all. But under the rules governing the Penang Court, where a defendant does not appear, a decree is given as a matter of course. *Arunachalam Chettiar* v. *Muhammad Salihu Marakkayar*[1], is the decision of a Bench of the Madras High Court. The plaintiff filed a suit in the Sub-Court, Tanjore, on a foreign judgment obtained by him in the Colombo District against the defendants. According to the rules of the Colombo Court, where the defendant was *ex parte*, the plainiff was entitled to a decree merely on proving that the defendant was properly served. Their Lordships held that judgment so obtained was not on the merits of the case. At page 804, Sir Kumaraswami Sastriar, J., observes as follows :—

> " So far as the first point is concerned, it is clear that the suit was not decided on its merits. The procedure in the District Court of Colombo is that where no defence is entered, an affidavit of service is filed and judgment follows. In the present case the defendants, though served, did not enter appearance or file any written statement. Thereupon the plaintiff filed an affidavit of service and a decree followed as a matter of course. Reference was made to Exhibit D, a certified copy of processes and their returns in suit No. 4186 of 1915 of the Colombo District Court but there is nothing there to show that any evidence was recorded or that the Court went into the merits though the defendants were *ex parte*."

His Lordship at the end of the judgment concludes :

> " I am of opinion that the judgment of the Colombo District Court which was obtained under the rules of that Court which enact that where the defendant is *ex parte* the plaintiff is entitled to a decree merely on proving that the defendant was properly served is not a judgment obtained on the merits of the case and that section 13 (*b*) bars a suit on that judgment."

In *P. L. S. Firm, Colombo* v. *Sulaiman*[2], a Bench of this Court held that a decree *nisi* passed by the District Court of Colombo, under section 85 of the Ceylon Civil Procedure Code, in a suit on a promissory note or a hundi where the defendant is *ex parte* is not a decision on the merits of the case within the meaning of section 13(*b*) of the Civil Procedure Code, and that the fact that an affidavit, which was a reduplication of the plaint, was filed in the Court at the time of the passing of a decree *nisi* by the Court does not make it a decision on the merits. Section 85 of the Civil Procedure Code of Ceylon provides that when the defendant has been duly served with summons, if the defendant fails to file his answer on the day fixed therefor and if on the occasion of such default of the defendant the plaintiff appears, then the Court shall proced to hear the case *ex parte* and pass a decree *nisi* in favour of the plaintiff. In the above case also an affidavit which was alleged to have been filed as a reduplication of the plaint was relied on. At page 462, their Lordships observed :

> " The affidavit relied on does not appear in the Journal and it is not explained under what provision of law it has been used. It may be that it is the practice of the Colombo Courts to use affidavits of this kind before ordering the issue of the decree *nisi*, but in the absence of any evidence on the point it seems to me that the affidavit in question cannot be relied upon to make this a decree on the merits."

Their Lordships after considering the merits of the case and sections 703 and 708 came to the conclusion that the decree is admittedly one for default and not a decree on merits. It may be pointed out that the case before us is one under the summary procedure. Under sections 7 and 705 the plaintiff is required to file an affidavit along with an application supporting the statement in the plaint that the sum claimed by him is justly due to him from the defendant. It is not clear whether any such affidavit was filed before the Ceylon Court. No such affidavit has been filed along with the Journal of the Ceylon Court which is marked as Exhibit A-1 in the case.

In a recent case reported in *Rajaratnam* v. *Muthuswami*[3], their Lordships the Chief Justice and Panchapakesa Ayyar, J., have held that although the judgment and decree of a foreign Court might have been passed *ex parte*, if it was passed on a consideration of the evidence adduced in the case, the decision must be deemed to have been on the merits and that a suit on that judgment is maintainable in a Court in India. The defendant, who was the appellant before their Lordships, was *ex parte* in the suit in the District Court of Nuwaraeliya, Holden at Hatton,

1. (1927) 26 L.W. 803.
2. (1929) 57 M.L.J. 459.
3. (1958) 1 M.L.J. 194 : A.I.R. 1958 Mad. 203.

Ceylon. According to the procedure obtaining in Ceylon, a decree *nisi* was passed after taking the evidence of the plaintiff and finally the decree was made absolute after notice of the decree *nisi* had been served on the defendant and the latter had failed to appear in spite of the notice. My Lord the Chief Justice dealing with the contention observes that the only point he (counsel for the defendant-appellant) could urge in support of this contention was that the appellant was *ex parte* in that suit, and that it is clear however, that though the judgment and decree of a foreign Court might have been passed *ex parte*, if it was passed on a consideration of the evidence adduced in the case, the decision must be deemed to have been on the merits. In the case above cited, though the decree was passed *ex porte* the evidence of the plaintiff was taken and the judgment was given on a consideration of the evidence adduced in the case. We respectfully agree with the decision of the Bench and hold that even though a decree in a foreign Court may be passed *ex parte*, it will be binding if evidence was taken and the decision was given on a consideration of the evidence. As observed in *Wazir Sahu* v. *Munshi Das*[1], the real test is not whether the decision was or was not *ex parte* but whether it was merely formally passed, as a mater of course, or by way of penalty, or it was based upon a consideration of the truth or otherwise of the plaintiff's claim.

In the present case, as observed already, the records do not disclose whether any affidavit at all was filed by the plaintiff as required under the Ceylon Civil Procedure Code. Even if it was filed before the Court, it is not before us. The Judgment of the District Court, Colombo, is as follows : " Enter judgment for plaintiff as prayed for ". The security and answer as directed by the Additional District Judge on 8th December, 1953, were not furnished by 21st December, 1953 and immediately on 21st December, 1953, the learned Additional District Judge entered judgment. The judgment is clearly not a consideration of the evidence but was passed as the defendant failed to furnish security and to file an answer as directed by the Additional District Judge. We are of opinion that the judgment of the Colombo District Court in No. 15437/S is one for default and not given on the merits of the case. The appeal is dismissed. There will be no order as to costs in this appeal.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE KUNHAMED KUTTI.

Arumugan Chettiar .. *Appellant**

v.

V. Kalyanasundaram Pillai and another .. *Respondents.*

Limitation Act (IX of 1908), *Article* 182 (2)—*Applicability*—" *Where there has been an appeal* "—*Meaning of*—*Suit against two defendants*—*Decree passed against one only and suit against the other dimissed with costs*—*Appeal by plaintiff against decree awarding costs only*—*Dismissal*—*Execution against defendant who was made liable*—*Starting point of limitation.*

The words "where there has been an appeal" in Article 182 (2) of the Limitation Act do not admit of any qualification or restriction either as to the character of the appeal or as to the parties to it. Limitation for execution would run from the date of the appellate decree notwithstanding the fact that the judgment-debtor against whom execution is sought was not a party to the appeal. So long as there is an appeal from a portion of the decree, Article 182 (2) would apply and the date of the appellate decree would be the starting point of limitation even in regard to the execution of the first Court's decree in respect of the portion not appealed against.

Nagendra Nath Day v. *Suresh Chandra Day*, (1932) 63 M.L.J. 329 : L.R. 59 I.A. 283 : I.L.R. 60 Cal. 1 (P.C.) ; *Satish Chandra Chaudhuri* v. *Girish Chandra Chakravarthy*, (1920) I.L.R. 47 Cal. 813 ; *Krishnama Chariar* v. *Mangammal*, (1902) I.L.R. 26 Mad. 91 and *Kanniammal* v. *Balakrishna*, A..I.R. 1935 Mad. 557, followed.

Saraswathi Ammal v. *Rajagopal Ammal*, (1951) 2 M.L.J. 63 : I.L.R. (1952) Mad. 1 (F.B.), relied on.

1. A.I.R. 1941 Pat. 109 at 112.

* A.A.O. No. 320 of 1958.

21st December, 1960.
(30th Agrahayana, 1882, Saka).

Bhawanipore Banking Corporation, Ltd. v. *Gouri Shaukar Sharma*, (1950) S.C.J. 171 : 1950 S.C.R. 25 ; *Jacinto* v. *Fernandes*, A.I.R. 1939 Bom. 454 ; *Sivaramachari* v. *Anjenaya Chetty*, (1951) 2 M.L.J. 245 : I.L.R. (1952) Mad. 277 (F.B.), distinguished and explained.

Appeal against the Order of the Court of the Subordinate Judge of Tuticorin, dated 18th August, 1958 and made in E.P. No. 43 of 1958 in O.S No. 92 of 1949.

T. R. Srinivasa Ayyar and *S. Krishnaswamy*, for Appellant.

C. S. Rajappa, for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—The only question involved in this appeal is whether the application for execution of the decree in O.S. No. 92 of 1949, on the file of the Sub-Court, Tuticorin, is barred by limitation. The suit was laid against the respondent and his wife Arunachalathammal as the 2nd defendant for recovery of certain monies due on dealings, which the appellant had with the former. Arunachalathammal was impleaded as a guarantor. On 24th November, 1951, the Subordinate Judge, Tuticorin, passed a decree for a sum of Rs. 34,479-6-2 and costs, against the appellant dismissing the suit against Arunachalathammal with costs. As no statement of costs was filed on behalf of Arunachalathammal, those costs were not taxed. Nevertheless, the appellant filed A.S. No. 940 of 1952, in this Court, challenging the validity of the decree in so far as it directed costs to be paid by the appellant to Arunachalathammal. That appeal was dismissed on 14th November, 1956. In the meanwhile, the appellant had applied on 31st August, 1954, for execution of the decree against the respondent. That application was dismissed on 8th February, 1955. On 4th March, 1958, the appellant filed an execution application for realisation of the amount due under the decree by arrest of the respondent. The learned Subordinate Judge dismissed the application as barred by limitation. Hence this appeal.

As the execution petition, out of which this appeal arises, was filed more than three years after the date of the final order in E.P. No. 64 of 1954, the decree-holder could not invoke the provisions of Article 182 (5) in his favour.

Before the learned Subordinate Judge it was contended that the appropriate Article to apply in the present case would be Article 182 (2) of the Limitation Act, and, as the appeal against the decree for costs in favour of Arunachalathammal was dismissed only on 14th November, 1956, the present application was claimed to be in time. This contention was rejected by the learned Subordinate Judge for the reason that the respondent, who was the first defendant in the suit, was not concerned in the appeal, the appeal being restricted to the decree in favour of the 2nd defendant alone. Support was sought for this view in the decision of a Full Bench reported in *Sivaramachari* v. *Anjaneya Chetty*[1], where it was held that the term "appeal" referred to in Article 182 (2) of the Lemitation Act should receive a restricted meaning, and would mean only the decree of the appellate Court which was sought to be executed. As stated earlier, the claim in the present case was against two defendants. There was a single decree, though such decree comprised two parts : (1) a direction in favour of the appellant against the respondent for payment of Rs. 34,479-6-2, and (2) a direction in favour of the 2nd defendant for costs to be paid by the appellant. It was the latter part of the decree that was the subject-matter of the appeal to this Court.

The question that arises for consideration is whether the appeal to this Court should be held to be from the decree which is now executed. In *Satish Chandra Chaudhuri* v. *Girish Chandra Chakravarthy*[2], a suit was laid to recover a sum of money against two persons. The suit was decreed against one of them, while it was dismissed against the other. There was an appeal by the plaintiff in regard to the latter portion of the decree, which ultimately failed. A question arose whether the time for execution of the decree against the former should run from the date of the original decree itself or from the date of the dismissal of the appeal, with which the

1. (1951) 2 M.L.J. 245 : I.L.R. (1952) Mad. 277 (F.B.).
2. (1920) I.L.R. 47 Cal. 813.

judgment-debtor sought to be proceeded against was not concerned. It was held that, where an appeal had been preferred against a decree, the period of limitation for an application to execute the original decree should run from the date of the appellate decree, though the appeal was against one defendant and the application for execution was against the other. In *Nagendra Nath Dey* v. *Suresh Chandra Dey*[1], the Privy Council held that the words in Article 182 (2) "where there has been an appeal" did not admit of any qualification either as to the character of the appeal or as to the parties to it, and that the time for execution would run from the date of the decree of the appellate Court, notwithstanding the fact that the judgment-debtors, against whom execution was sought, were not parties to the appeal. In *Kanniammal* v. *Balakrishna*[2], the trial Court passed a decree granting only some of the several reliefs prayed for by the plaintiff, refusing the rest. The plaintiff appealed against the refusal by the trial Court to grant the other reliefs prayed for. He later sought execution in respect of the decree which he obtained in the first instance. It was held that the limitation would begin to run even as regards the trial Court's decree only from the date of the appellate decree. Beasley, C.J., observed at page 558:

> "It seems to me that in this case and indeed in all cases what Article 182 (2) refers to is a decree, *viz.*, one decree and that it is not permissible for Courts in execution to look into the matter and say that, as there are several reliefs which are severable, the decree, although nominally one decree, consists of several decrees. That Courts are not permitted to take up that attitude is, I think, clearly shown by the recent decision of the Privy Council in *Nagendranath Dey* v. *Suresh Chandra Dey*,[1]

These decisions undoubtedly support the principle contended for on behalf of the appellant. The learned counsel for the respondent, however, contended, that the decisions mentioned above should no longer be regarded as laying down the correct principle, in view of what the Supreme Court held in *Bhawanipore Banking Corporation, Ltd.* v. *Gouri Shonkar Sharma*[3]. In that case, there was an *ex parte* preliminary mortgage decree, and a final decree followed on 22nd December, 1941. Even before the final decree was passed, the judgment-debtor filed an application under section 36 of the Bengal Money Lenders Act for re-opening the preliminary decree. But the application was dismissed for default. Attempts to revive the application failed. An appeal therefrom was dismissed on the 3rd of July, 1944. The decree-holder filed an execution application on the 9th of April, 1945, more than three years after the date of the final decree, but within the period of limitation if it were to be reckoned from the date of dismissal of the appeal against an order refusing to grant relief under section 36 of the Bengal Money Lenders Act. Reliance was placed on behalf of the decree-holder *inter alia* on Article 182 (2) of the Limitation Act. The Supreme Court rejected the contention, and held that, in order that advantage could be taken of the appellate decree for the purpose of reckoning the period of limitation, the appeal should have been from the decree in respect of which execution was sought. Dealing with the contention that Article 182 (2) was comprehensive enough to include an appeal from an order dismissing an application under the Money Lenders Act for default, Fazl Ali, J., observed at page 29:

> "This argument also is a highly far-fetched one, because the expression "where there has been an appeal" must be read with the words in column I of Article 182, *viz.*, "for the execution of a decree or order of any civil Court........", and, however broadly we may construe it, it cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution."

The precise scope of Article 182 (2) came up for consideration before a Full Bench of this Court in *Sivaramachari* v. *Anjaneya Chetty*[4]. That was a case in which there was a mortgage decree. During the pendency of the suit, a certain person applied that the defendant was dead and he, as the sole executor under his will, was entitled to be brought on record as his legal representative. His request was

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1. (1932) 63 M.L.J. 329 : L.R. 59 I.A. 283 : I.L.R. 60 Cal. 1 (P.C.).
2. A.I.R. 1935 Mad. 557.
3. (1950) S.C.J. 171 : 1950 S.C.R. 25.
4. (1951) 2 M.L.J. 245 : I.L.R. (1952) Mad. 277 (F.B.).

rejected on the ground that the defendant was not proved to be dead. A mortgage decree followed, the defendant having been set *ex parte*. The executor under the alleged will filed a revision petition to this Court which was later dismissed. He was however, able to obtain a probate of the will : impleading him as a party to the execution proceedings, the decree-holder applied for execution of the mortgage decree. The application was filed more than three years after the date of the decree, but within the period of limitation from the date of dismissal of the civil revision petition. The question arose as to the starting point of limitation for execution of the mortgage decree, whether it was from the date of the decree itself or from the date of the order in revision. It was held that Article 182 (2) should be confined to a case where there had been an appeal from the decree in the suit, and could not be extended to an appeal from any interlocutory order in the suit or to an appeal from any collateral proceeding. In delivering the judgment, My Lord the Chief Justice, referring to the word " appeal " in clause (2) of column 3 of Article 182, observed at page 255 :

> " In my opinion, that word which is no doubt a general word must bear a meaning restricted to its context and the meaning that I would give to it is an appeal from a decree or order of the nature mentioned in clauses (1), (3) and (4), that is to say, an appeal from the original decree or order, an appeal from a decree following a review of judgment, and an appeal from an amended decree. The true test is that the decree of the appellate Court in the appeal must be the decree which is sought to be executed."

It is contended—a contention which found acceptance with the learned Subordinate Judge—that these observations would apply to a case, where in the same decree there are two separate directions like the one in the present case, and that, therefore, where a decree sought to be executed is distinct and severable in regard to one portion of it, an appeal in regard to the other portion of the decree would not come within Article 182 (2). This argument was sought to be supported by reference to the decision in *Jacinto* v. *Fernandes*[1]. In that case there was a suit for partition of immovable property which comprised two portions. The civil Court had jurisdiction to effect partition only in regard to one portion. Partition of the other portion had to be effected by the Collector. In respect of the former property, the Court passed a final decree, and the appellate decree therefrom was passed on 16th January, 1931. The Collector passed a partition decree in regard to the other property on the 27th of May, 1925. An application for execution of the latter decree was filed in 1934 within three years of the decree on appeal and more than three years after the decree by the Collector. It was held that, for enforcing the decree of the year 1925 in regard to the property partitioned by the Collector, the date of the appellate decree relating to the partition effected by the civil Court would have no relevance. The observations should be held to be more or less in the nature of *obiter*, as the learned Judges held on another point that the application was not barred by limitation. But, whatever that might be, in the present case both the decree for the sum of Rs. 34,479-6-2 and the decree for costs against the appellant were passed on the same date in the same suit by the same Court. In *Sivaramachari* v. *Anjaneya Chetty*[2], the learned Chief Justice observed that the language of clause (2) of Article 182 indicated that the appeal referred to therein was an appeal from the original decree or order mentioned in clause (1). That condition is undoubtedly satisfied in the present case. It must be remembered that both the cases, namely, *Bhawanipore Banking Corporation, Ltd.* v. *Gouri Shankar Sharma*[3], and *Sivaramachari* v. *Anjaneya Chetty*[2], were concerned not with a case of an appeal which arose directly from the decree itself which was subsequently sought to be executed, but from an independent or interlocutory order in the suit : in such cases it was held that the term " appeal " in Article 182 (2) would refer only to an appeal from the decree which is sought to be executed and not to appeals from interlocutory orders or from those collateral proceedings. The question, whether in the matter of execution of one part of a decree time would run from the date of the original decree itself or from the date of an appellate decree relating to another part did not arise in those

1. A.I.R. 1939 Bom. 454.
2. (1951) 2 M.L.J. 245 : I.L.R. (1952) Mad. 277 (F.B.).
3. (1950) S.C.J. 71 : 1950 S.C.R. 25.

cases. In *Kristnama Chariar* v. *Mangammal*[1], it was held that, where only a portion of a decree for payment of money had been appealed against, the period of limitation for an application to execute the other portion which had not been appealed against would be three years from the date of the decree on appeal. Bashyam Ayyangar, J., in the course of the judgment, observed at page 95 :—

"All that clause 2 of the third column of Article 179 (corresponding to clause 2 of Article 182) provides is that if a question of limitation should arise as to the execution of a decree which has been appealed against, limitation is to be computed not from the date of the original decree but from that of the appellate decree. And as it will generally lead to confusion—and in certain classes of cases even to anomalies—if limitation is to be reckoned from different starting points in respect of the execution of different parts of the same decree, the Legislature has fixed, without causing any hardship to either party, one and the same starting point.

In my opinion this is sound from a juridical point of view. When an appeal is preferred from a decree of a Court of First Instance, the suit is continued in the Court of Appeal and re-heard either in whole or in part, according as the whole suit is litigated again in the Court of Appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of First Instance. The mere fact that a matter is litigated both in the Court of First Instance and again, though only in part, in the Court of Appeal, cannot convert or split the suit into two and there can be only one final decree in that suit, *viz.*, the decree of the Court of Appeal. There cannot be two final decrees in such a suit, one by the Court of First Instance and the other by the Court of Appeal. Section 577, Civil Procedure Code, therefore provides that the appellate judgment may be for confirming, varying or reversing the decree appealed against. If the appeal be against a portion of the decree only and the appeal be dismissed the decree will be one confirming as a whole the decree appealed against including the portion not appealed against and the confirmation is not limited to the portion appealed against."

This view was accepted by the Full Bench in *Saraswathi Ammal* v. *Rajagopal Ammal*[2]. In that case, a question arose as to the valuation for the purpose of grant of leave to appeal to the Supreme Court. There were two appeals in the High Court by different parties from the same decree of the lower Court in a suit. The question to be decided was whether, for the purpose of valuation, both the decrees passed by the High Court in appeal should be deemed to be one decree. Referring to the observations of Bashyam Ayyangar, J., in *Kristnama Chariar* v. *Mangammal*[1], cited above, it was held that there was only one decree notwithstanding the fact that there were several appeals and separate decrees in each.

It would follow that, even though there has been an appeal from only a portion of a decree, the decree that will be ultimately passed thereon would be a decree in the suit itself. This principle is consistent with Order 41, rule 33, Civil Procedure Code, which enables the appellate Court to deal with the entire decree, although the appeal may be as to the part of the decree ; it also enables the Court to give direction in favour of the parties who have not actually filed appeals or cross-objections. In one sense, therefore, an appeal from a part of the decree brings the entire subject-matter of the suit before the appellate Court. We are, therefore, of opinion that the true principle to be applied is, that so long as there is an appeal from a portion of a decree, the date of the appellate decree would be the starting point of limitation under Article 182 (2) even in regard to the execution of the first Court's decree in respect of the portion not appealed against.. The distinction laid down in *Sivaramachari* v. *Anjaneya Chetty*[3], is between a case where an appeal is against a decree itself, whether it be a part of the decree or whole of it, and a case where an appeal is against an order which is not part of the decree but independent of it, whether it be at interlocutory stage or one in a collateral matter. The case before the learned Judges was of the latter type. In the former case we are of the view that the provisions of Article 182 (2) of the Limitation Act would apply. We are, therefore, of opinion that the order of the learned Subordinate Judge holding that the execution application is barred by limitation cannot be supported. The appeal is allowed with costs. The Execution Petition will be restored to file and be disposed of.

P.R.N. ——— *Appeal allowed.*

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1. (1902) I.L.R. 26 Mad. 91.
2. (1951) 2 M.L.J. 63 : I.L.R. (1952) Mad. 1 (F.B.).
3. (1951) 2 M.L.J. 245 : I.L.R. (1952) Mad. 277 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE SRINIVASAN.

M. K. Navaneetham Naidu .. *Petitioner**

v.

Gangaiah Naidu and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 22, rule 3 and Order 1, rule 10—Suit by benamidar—Real owner—When could come on record on the death of benamidar.

Where a suit is laid by a benamidar claiming title in himself and the suit is not laid in any representative character, the purported true owner cannot come on record on the death of the alleged benamidar either under Order 1, rule 10 or Order 22, rule 3 of the Code of Civil Procedure. Such a procedure is possible only if the benamidar is suing in a representative capacity and not otherwise.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Tindivanam dated 4th December, 1959 and made in I.A. No. 856 of 1959 in O.S. No. 162 of 1959.

R. Krishna Iyer, for Petitioner.

K. S. Ramamurthi and *K. Sarvabhauman*, for Respondents.

The Court made the following

Order.—The point that arises is this revision petition is whether the order of the District Munsif of Tindivanam allowing a petition to implead the first respondent as plaintiff is correct. The facts are these.

The plaintiff in O.S. No. 162 of 1959 on the file of the District Munsif of Tindivanam died and his two widows (Respondents 2 and 3 in this petition) were brought on record. The suit was for recovery of possession of certain properties on the basis of title created by a document of sale in favour of the deceased plaintiff. The first respondent filed a petition under Order 22, rule 3, Civil Procedure Code, seeking to come on record as the legal representative of the deceased plaintiff and to continue the suit. His case was that the property in dispute belongs to him and that the deceased plaintiff was his benamidar, the document of sale having been executed in his favour only to enable the recovery of the property, the first respondent claiming that as he was residing elsewhere, he was not in a position to institute and continue the action. The first respondent also alleged that on finding that the widows, the legal representatives of the deceased plaintiff, were acting adversely to his interest, he found it necessary to come on record by himself and to prosecute the suit.

Though the learned District Munsif rightly held that neither Order 22, rule 3, Civil Procedure Code, nor Order 1, rule 10, Civil Procedure Code, would apply to the facts of the case, yet, under the circumstances, the principles underlying these provisions should be liberally construed. He thought that the apprehensions of the first respondent that the widows of the deceased plaintiff were colluding with the defendant in the suit were not ill-founded and in order to protect the interests of the first respondent, the person claiming to be the real owner of the property, it was not proper to allow the widows to continue to prosecute the suit as plaintiffs. He accordingly directed the first respondent to be brought on record as the second plaintiff and the legal representatives of the deceased plaintiff to be transposed as defendants in the suit.

The defendant in the suit questions the correctness of this order.

There is considerable authority for the position that a benamider can maintain an action in his own name and that so long as the benamidar does not purport to sue in a representative capacity, the real owner cannot come in on his death under Order

* C.R.P. No. 2141 of 1959. 2nd December, 1960. (11th Agrahayana, 1882, Saka).

22, rule 3. It was so decided in *Doraiswami Thevar* v. *Chidambaram Chettiar*[1]. Jackson, J., relied upon an earlier decision in *Periannan Chettiar* v. *Rangachi Reddi and Maruthi Pillai*[2]. This decision proceeded upon the well-recognised principle that a legal representative as defined under section 2 (11) of the Civil Procedure Code will not include the real owner. Whether the real owner can intervene and claim to be brought on record during the lifetime of the benamidar suing as the plaintiff is not the question that arises now. The alleged benamidar is dead and on his death, the law allows only his legal representatives to be brought on record. There is no doubt that the real owner will not be the legal representative within the meaning of section 2 (11) of te Civil Procedure Code.

It is also clear that Order 1, rule 10, which was partly relied upon before the lower Court has no application. None of the conditions contemplated in this rule obtains in this case. Sub-rule (2) of rule 10 enables the Court to direct that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. Even this sub-rule cannot apply. The suit was laid by the deceased plaintiff on the allegation that he had purchased the property on payment of consideration to the first respondent, and had acquired title to the property. There was no suggestion either in the pleadings that the deceased plaintiff was only a benamidar maintaining the action on behalf of the real owner. Since the law permits a benamidar to maintain an action in his own name and the real owner would be enabled to enjoy the benefits of any decree that such benamidar may obtain, no circumstances appear to exist which would justify the bringing on record of the alleged real owner. What sub-rule (2) contemplates is that the substitution or the addition of a new party can be effected if it is necessary to effectually adjudicate upon questions involved in the suit. The questions involved in the suit as laid did not call for the determination of the question as to who was the real owner of the property or of any disputes *inter se* the benamidar and the real owner. That being the case, this sub-rule will not also justify the real owner being brought on record as the plaintiff.

In *Pynda Andalammal* v. *Chella Peda Jangamayya*[3], the earlier decision referred to was followed and Horwill, J., held that the real owner cannot be allowed to continue the suit as the legal representative of the benamidar, plaintiff, who died *pendente lite*. The learned Judge distinguished the decision in *Balasubramaniam Chetty* v. *Kothandaramaswami Nayanimvaru*[4]. This Full Bench decision decided that where a decree is held by one person as benamidar for another and the holder dies, the true owner can apply for execution and if his title is in dispute, the question can be decided in these proceedings. Though this Full Bench was constituted to resolve the difference of opinion which existed upon this question between two earlier Bench decisions of this Court, that conflict remained unresolved and the Full Bench confined its answer to a case where the facts were similar to those of the case before it. The view that was taken by the Full Bench was based upon Order 21, rule 16. The learned Chief Justice observed :

> "If *A* in fact holds a decree as benamidar for *B*, on *A's* death his heirs cannot claim it as their property. The decree is the property of *B* and death has removed the nominal holder from the scene. Why should not *B* in these circumstances ask the Court to execute the decree at his instance on the ground that by operation of law he has obtained a complete title to it ?"

The principle of this decision was however distinguished, as I said earlier, by Horwill, J., who held that very different considerations would arise in an application to be allowed to continue the suit.

It would accordingly appear from these decisions that the real owner cannot be brought on record on the death of the benamidar plaintiff.

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1. (1930) 58 M.L.J. 57 : 31 L.W. 194.
2. (1915) 17 M.L.J. 116.
3. (1943) 2 M.L.J. 362.
4. (1942) 2 M.L.J. 463 : I.L.R. (1943) Mad. 164 (F.B.).

On behalf of the respondents *Ch. Gar Narayan* v. *Sheolal Singh*[1], has been relied on. In that case, the Judicial Committee held that the benamidar has no beneficial interest in the property that stands in his name and that in fact he represents the real owner, and so far as their relative legal position is concerned, he is a mere trustee for him. Their Lordships observed :

"In such circumstances, there is no reason why an action cannot be maintained in the name of the benamidar in respect of the property, although the beneficial owner is not party to it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rules of *res judicata*. It is open to the latter to apply to be joined in the action ; but whether he is made a party or not, a proceeding by or againsr his representative in its ultimate result is fully binding on him."

It is argued relying on these observations that in the peculiar circumstances of this case, where the legal representatives of the deceased plaintiff are suspected to be colluding with the defendant, there is grave apprehension of the result of the suit being binding upon the real owner and to his detriment. In these circumstances, it is claimed that the real owner should be permitted to come on record. Jackson, J. in *Doraiswami Thevar* v. *Chidambaram Chettiar*[2], examined this decision also and thought that it only went to the extent of laying down

"that a benamidar legitimately represents the real owner, is a mere trustee for him, and, if he likes, may sue in his own name in an action to which the beneficial owner is no party. But it does not lay down in such a suit the trustee sues in a representative character."

Though there are observations to the effect that the real owner would be bound by a decree passed against the benamidar, it seems to me that where the legal representatives of the benamidar actively resist the coming on record of the real owner as the plaintiff, it is doubtful if such a decree would bind the real owner. Such a result is possible only when *ex facie* the benamidar is suing in a representative character and not otherwise.

Another decision relied upon by the respondents is *Seth Thakurdas Gordhandas Gujarathi Mod* v. *Dagdulal Banchoddas Ganparade and another*[3]. In this case, Vivian Bose, J., disagreed with the decision in *Doraiswami Thevar* v. *Chidambaram Chettiar*[2], and purported to rely upon the Privy Council decision referred to, which, according to the learned Judge, laid down that it is open to the real owner to apply to be joined in the action brought by the benamidar. He proceeded to hold that the real owner had a right to be so joined. He observed :

"If the suit does not abate and if it is still alive, then the real owner can, in my opinion, apply to be joined, and once he is joined, he can continue the suit. But, as I have said, he must continue the same suit and cannot set up a different cause of action or different pleas. It is argued that the mere fact that he is setting up a title in himself here changes the cause of action and converts the suit into one of a different character. That again is not so. The question whether he is the real onwer is an independent one and his right to be joined depends upon whether he is the real owner or not. It is just as independent as whether a person is a legal representative or not. For that purpose, of course, an enquiry has to be made and if the decision is that he is the legal representative for the real owner in this case then he is entitled to be joined and once he is joined, then the original suit is converted into one of a different character................"

With all respect to the learned Judge, where the suit itself was laid by the alleged benamidar claiming title to the property in himself, and there was no hint of any representative character, the joining of a person claiming to be the real owner does introduce into the suit totally different elements which call for determination. It really becomes under those circumstances, more particularly when the legal representatives of the deceased plaintiff deny that the suit was laid as a benamidar, the joinder of two suits, in one, the claim of the real owner to declare that he is entitled to the property as against the benamidar and the claim to recover possession from the defendant. If these facts do not convert the suit into one of a different character, I fail to see what else they do.

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1. (1918) 36 M.L.J. 68 : L.R. 46 I.A. 1 : I.L.R. 46 Cal. 566 : A.I.R. 1918. C.P. 140 (P.C.).
2. (1930) 58 M.L.J. 57 : 31 L.W. 194.
3. A.I.R. 1941 Nag. 178.

Following the decisions of this Court, I am of opinion that the learned District Munsif erred in allowing the petition to bring the first respondent on record as plaintiff. The petition is allowed. There will, however, be no order as to costs.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

The General Commercial Corporation (Private) Ltd. .. *Petitioner**

v.

The Second Additional Income-tax Officer, First Circle, Madras and another .. *Respondents.*

Income-tax Act, 1922 (*XI of* 1922), *sections* 46 (2), 46 (5-*A*) *and Proviso* (ii) *to section* 46 (7)—*Effect of the Proviso* (ii) *to section* 46 (7)—*Issue of notices by the Income-tax Officer—Period of limitation—Certificate under section* 46 (2) *of the Act forwarded to the Collector—If amounts to commencement of a proceeding for recovery—Department resorting to more than one mode of recovery at the same time—Special reasons not recorded by the Income-tax Officer—Effect.*

Notwithstanding the long inaction on the part of the Department and the Collector, the factum of the issue of the certificate under section 46 (2) of the Income-tax Act cannot be disputed.

What section 46 (7) of the Income-tax Act contemplates as the commencement of a proceeding is an action initiated by the department which may set in motion other agencies for the actual recovery. Hence, since the procedure for recovery of the amount cannot be set in motion except by the issue of a certificate under section 46 (2) of the Act, the issue of such a certificate marked the commencement of the recovery proceedings. The fact that the Collector failed or was unable to take further action on the certificate or that it proved infructuous does not mitigate against the view that the issue of the certificate itself was a proceeding for recovery within the meaning of the *Explanation* to section 46 (7).

In order that Proviso (ii) to section 46 (7) of the Act should apply, it is not necessary that the stay should be with reference to any particular recovery proceeding, as the proviso does not refer to "any recovery proceeding" being stayed but to "recovery proceedings in any case."

That the notices issued under section 46 (5-*A*) of the Act did not yield successful results, or that on the denial of the constituents that they had in their hands any sums due to the assessee no further action could be or was taken against them by the department has no relevance at all in examining the validity of the action taken.

What is important in the application of the various provisions of section 46 is that any mode of recovery must be started within the period of limitation, not that the same mode of recovery becomes a different mode, in so far as different persons are concerned.

On a reading of the *Explanation* to section 46 (7), it folllows that before the Income-tax Officer could take any steps under section 46 (5-A) of the Act, while proceedings for recovery under section 46 (2) of the Act were already on foot, he should record special reasons why the adoption of an additional mode was necessary. Since (in the instant case) no such reasons were recorded, the entire proceedings under section 46 (5-*A*) of the Act are vitiated.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of Prohibition prohibiting the first Respondent from initiating proceedings under section 46 (5-A) of the Indian Income-tax Act to recover the arrears of Income-tax due by the Petitioner for the years 1948-49 and 1949-50 respectively and also prohibiting the Second Respondent from acting under any notice purported to have been issued by the 1st Respondent under section 46 (5-A) of the Indian Income-tax Act.

T. V. Viswanatha Ayyar, for Petitioner.

C. S. Rama Rao Sahib, Special Counsel for Income-tax on behalf of Respondent.

The Order of the Court was made by

Srinivasan, J.—The Petitioner in these two writ petitions is the assessee, The General Commercial Corporation, Private, Limited. The assessments were made for the years 1948-49 and 1949-50 on 23rd March, 1953. Appeals were taken to the Appellate Assistant Commissioner which were disposed of in May, 1957. These

* W.P. Nos. 603 and 604 of 1957. 9th August, 1960. (18th Sravana, 1882, Saka).

appeals failed. Further appeals to the Income-tax Appellate Tribunal were filed which were pending on the date of the filing of these writ petitions. We are informed that they were subsequently disposed of on 7th November, 1958. Some relief is said to have been given to the assessee by the Appellate Tribunal and revised demands have been issued under section 29 of the Act on 14th March, 1959. It is also stated that applications under section 66 (1) of the Act were filed before the Tribunal which were dismissed.

The action on the part of the Income-tax Authorities which has led to the filing of these writ petitions is the issue of notices by the Income-tax Officer on 26th July, 1957 to the Bank of India Ltd., Madras under section 46 (5-A) restraining the Bank of India from paying moneys standing to the credit of the assessee company in current account with that bank and calling upon the bank to pay the amounts to the Income-tax Department in discharge of the income-tax demands against the assessee. According to the assessee, the limitation for taking proceedings under section 46 of the Act against the assessee had expired by the end of 1955 and the impugned proceedings started against the assessee in 1957 are barred. On this basis, these petitions praying for writs of prohibition have been filed.

In order to deal with the merits of the case, it is necessary to set out the following facts which emerge from the petition, the counter thereto, the reply affidavit of the petitioner and the supplemental counter affidavit filed by the Department. It has been stated that the assessments for the two years were completed on 23rd March, 1953. It is common ground that notices of demand were issued on 25th March, 1953 under section 29 of the Act. Appeals to the Appellate Assistant Commissioner filed on 15th April, 1953, were dismissed on 15th May, 1957. In the meantime, a writ petition had been filed in the High Court seeking an appropriate writ to direct the Income-tax Officer not to treat the petitioner as a defaulter and not to start or take any proceedings against the petitioner for the collection of tax pending the disposal of the appeals before the Appellate Assistant Commissioner. The High Court dismissed the writ petition. An interim stay that had been granted in C.M.P. No. 10180 of 1953 in the writ petition was however ordered to continue for one month from the date of the order which was the 8th March, 1954. Under section 46, sub-section (7), clause (2) of the Proviso thereto, the period of limitation of one year for the commencement of recovery proceedings under the Act has to be reckoned from the date from which any order of the Court staying recovery proceedings in any case is withdrawn. It is common ground therefore, that if the above proviso applied, the period of limitation in this case would expire on the 7th April, 1955. Had it been the case then of issue of notice under section 46 (5-A) for the first time in 1957, and had that been the only mode of recovery resorted to by the Department, the conclusion would be inescapable that the proceedings under section 46 (5-A) were barred by time. Now, even according to the assessee, in December, 1954, the Income-tax Officer had issued notices of attachment under section 46 (5-A) to several of the assessee's constituents ; the Electrical and Hardware Mart, Getz Brothers and General Commercial Corporation (India) Ltd., but at the time no such notice was issued to the Bank of India, Ltd. While Department takes the plea that the issue of the notices to other constituents under section 46 (5-A) in 1954, would enure to the validity of the notice issued to the Bank of India Ltd., in 1957, the learned counsel for the assessee contends that it would not, and that a notice issued to one debtor of the assessee within the period of limitation would not save limitation in respect of the notice issued to another debtor, though both notices may be in the nature of proceedings under section 46 (5-A). This is one of the important contentions which calls for an interpretation of the *Explanation* to section 46 (7) of the Act.

In the counter-affidavit filed by the Department it was pleaded that even as early as on 29th October, 1953, a certificate under section 46 (2) of the Act had been issued to the Collector of Madras for recovery of the arrears of the tax from the petitioner assessee. In his reply affidavit, the petitioner claimed that he was not aware of any such certificate having been issued and that if such a certificate had been issued

as long back as October, 1953, the inaction of the Collector in taking steps on the basis of such a certificate remains unexplained. The Department states that, though there is evidence to show that this certificate was forwarded to the Collector, it subsequently transpired that it was untraceable in the Office of the Collector. But, nevertheless, it is claimed that the issue of this certificate is an action towards the recovery of arrears within the meaning of the *Explanation* to section 46 (7) of the Act, and that it would save limitation in respect of the subsequent proceedings under section 46 (5-A). On this point, therefore, two questions arise for examination : (1) Whether a certificate was in fact forwarded to the Collector within the meaning of section 46 (2) of the Act and whether the issue thereof amounts to the commencement of a proceeding for recovery ; and (2) if so, whether the subsequent issue of notices to the debtors of the assessee both in 1954 and in 1957 under section 46 (5-A) is saved from the bar of limitation.

We may first of all deal with the question whether under section 46 (2) of the Act a certificate was issued by the Income-tax Officer to the Collector. According to the Department, a certificate was in fact so issued in October, 1953. The Petitioner, however, contended that he was not aware of the forwarding of any such certificate to the Collector. It was not, however, till 1957 that the Department woke up to the fact that no action had been taken by the Collector on the basis of the certificate. The petitioner appears to rely upon the circumstance that no action was at all taken by the Collector to suggest that no certificate was in fact forwarded to the Collector. Had such a certificate been issued on the date as claimed, there is no doubt that it would have been within the period of limitation, having been issued within one year from the last day of the financial year in which the demand was made. On the factum of the issue of this certificate, we are inclined to hold that it was so issued. In the supplemental counter-affidavit filed by the Department, it is stated that the records of the Department disclose that on 26th October, 1953 the Income-tax Officer directed the office to issue a certificate under section 46 (2). A certificate was put up for the officer's signature on 29th October 1953. At the same time, the office seems to have brought to the notice of the Income-tax Officer the fact that a petition had been filed by the assessee asking for the stay of coercive steps pending the disposal of a petition filed by him under section 66 (2) of the Act. But the Income-tax Officer noted that the proceedings could not be stayed and that the certificate should issue. The marginal entry in the record shows that this certificate was despatched on or about 2nd November, 1953. It is also stated in this supplemental affidavit that in May, 1954, the Collector was reminded but the Collector informed the Income-tax Officer on 9th June, 1954, that the certificate dated 29th October, 1953, did not appear to have been received in his office and requested that a copy might be furnished. Apparently, owing to some changes in the jurisdictions of the officers, the matter was lost sight of till the commencement of these writ proceedings.

The circumstance that even in May, 1954, the Income-tax Officer addressed the Collector for a report of the action taken on the certificate forwarded to him is strongly in support of the conclusion, that a certificate did in fact issue on 29th October, 1953, as claimed by the Department. This query by the Income-tax Officer was made long before any dispute regarding the present proceedings arose, and at or about the time when the earlier writ petition, W.P. No. 868 of 1953, was disposed of. Immediately after the stay of the recovery proceedings was vacated by the High Court in that writ proceeding, this enquiry appears to have been made. That is a clear indication that the Department was at that time aware that a certificate had been issued and that further action by the Collector on that certificate was pending. We are, therefore, justified in inferring that notwithstanding the long inaction on the part of the Department and the Collector, the factum of the issue of the certificate under section 46 (2) cannot be disputed.

On this point the petitioner has another contention to put forward. It is claimed that the mere forwarding a certificate under section 46 (2) does not amount to the commencement of recovery proceedings. Under section 46 (7) of Act

"no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the relevant date."

Again, in the *Explanation* to this sub-section, it is stated:

"A proceeding for the recovery of any sum shall be deemed to have commenced within the meaning of this section if some action is taken to recover the whole or any part of the sum within the period hereinbefore referred to. . . . . . ."

According to the learned counsel for the petitioner, the forwarding of a certificate by the Income-tax Officer to the Collector does not mark the commencement of recovery proceedings. What he claims marks such commencement is some action taken by the Collector on the basis of the certificate. It would follow from this argument that, if for some reason the Collector fails to take action on the certificate within the period of limitation, prescribed by sub-section (7), whether such failure was occasioned by negligence or design, revenue would lose all chances of recovery of the sum due. On a reading of the relevant provisions, we are not satisfied that the interpretation placed upon these provisions by Mr. Viswanatha Iyer, learned counsel for the petitioner, is at all sustainable. The several modes of recovery laid down in section 46 are those which are intended to be initiated by the Income-tax Officer concerned, though for purposes of putting through the measures of actual recovery, other machinery such as the Collector or the local authority may be employed. What this section contemplates as the commencement of a proceeding is an action initiated by the Department, which may set in motion other agencies for the actual recovery. It seems to us, therefore, that since the procedure for recovery of the amount cannot be set in motion except by the issue of a certificate under section 46(2), the issue of such a certificate marks the commencement of the recovery proceedings. There is support for this view in the decision *George* v. *Income-tax Officer, Madras*[1], of this Court. The argument to the contrary must, therefore, be rejected.

It follows then that a proceeding for recovery was validly commenced by the issue of the certificate to the Collector under section 46 (2) of the Act before the expiry of one year from the last day of the financial year in which the demand was issued under section 29. The fact that the Collector failed or was unable to take further action on the certificate or that it proved infructuous does not mitigate against the view, that the issue of the certificate itself was a proceeding for recovery within the meaning of the *Explanation* to section 46 (7) of the Act.

It has been noted that the validity of the issue of the notice under section 46 (5-A) to the Bank of India, Ltd., is sought to be sustained by the Department by reference to the other notices also under that provision issued in December, 1954, to certain other constituents of the petitioner. On this point, it has been contended by the petitioner, firstly, that it was beyond the period of limitation; secondly, that as they proved futile and no action against the constituents was taken, they cannot be used as steps in aid to prevent limitation running; and thirdly, that those notices themselves do not amount to proceedings in recovery. We shall disregard for the present the question whether the proceedings under section 46 (5-A) will be unaffected by the bar of limitation, in view of action having been taken under section 46 (2) well before the expiry of the period of limitation. Normally, the period of limitation in this case would have expired by 31st March, 1954. Now the Department relies on the stay ordered by the High Court in W.P. No. 868 of 1953 as extending the period of limitation up to 8th April, 1955, under Proviso (*ii*) to section 46 (7). It is contended by the petitioner however that the stay ordered by the High Court was not with reference to any pending recovery proceeding and that, therefore, the above proviso cannot apply. We find ourselves unable to accept the contention, that in order to make this proviso apply, the stay should have been with reference to any specified recovery proceeding. The relevant part of the proviso reads:

1. (1958) 1 M.L.J. 90 : (1958) 33 I.T.R. 22.

"(ii) Where recovery proceedings in any case have been stayed by any order of Court, be reckoned from the date from which the order was withdrawn."

It is clear that the proviso does not refer to "any recovery proceeding" being stayed but to "recovery proceedings in any case." The proviso could therefore have effect even in situations where no recovery proceedings have been commenced; and if stay had been ordered on a petition presented within what may be called the ordinary period of limitation, the extended period would commence from the date of withdrawal of the order of stay. The argument that the stay was not with reference to any particular recovery proceeding must fail on a proper construction of the proviso.

The date of service of the demand was 25th March, 1953. Limitation would normally expire by 31st March, 1954. The order of stay by the High Court was vacated with effect from 8th April, 1954. Under the abovesaid proviso, the period of limitation for proceedings in recovery would stand extended up to 8th April, 1955. It should thus follow that the issue of notices under section 46 (5-A) to the constituents of the petitioner in December, 1954, would be well within this period of limitation.

We can hardly see how the effectiveness or otherwise of a recovery proceeding can affect its validity. That the notices issued under section 46 (5-A) did not yield successful results, or that on the denial of the constituents that they had in their hands any sums due to the assessee, no further action could be or was taken against them by the Department, has no relevance at all in examining the validity of the action taken under section 46 (5-A).

Nor are we able to appreciate the argument that, the notices do not amount to recovery proceedings. One of the modes of recovery contemplated by section 46 of the Act is by requiring any person from whom money is due or may become due to the assessee to pay it over to the Department in full or partial discharge of the Income-tax demand against the assessee. Two results are possible; either the party to whom the notice is issued complies with the demand or he denies possession of funds belonging to the assessee. In either case, the notice may be said to discharge itself and no further action by the Department is either called for or is possible. That being so, we fail to understand how the action of the Department in issuing the notice under section 46(5-A) loses its character as a recovery proceeding, solely for the reason that no positive results flowed therefrom.

We shall now deal with the further contention of the petitioner, that the issue of notices under section 46 (5-A) to other persons in 1954 will not save limitation running against the Department in so far as the notice, also under section 46 (5-A) issued to the Bank of India Ltd., is concerned. The argument is that each notice issued under section 46(5-A) to a debtor of the assessee is an independent proceeding, and the issue of a notice to one debtor cannot be regarded as a continuation of a proceeding commenced by the issue of a notice under section 46 (5-A), to another debtor. An examination of this question calls for a scrutiny of the *Explanation* to section 46(7).

This *Explanation* is extracted in full below:

"A proceeding for the recovery of any sum shall be deemed to have commenced within the meaning of this section, if some action is taken to recover the whole or any part of the sum within the period hereinbefore referred to, and for the removal of doubts it is hereby declared that the several modes of recovery specified in this section are neither mutually exclusive nor affect in any way any other law for the time beng in force relating to the recovery of debts due to Government and it shall be lawful for the Income-tax Officer, if, for any special reasons to be recorded, he so thinks fit, to have recourse to any such mode of recovery notwithstanding that the tax due is being recovered from an assessee by another mode."

The significant parts of this *Explanotion* are the declaration that the several modes of recovery specified in this section are not mutually exclusive and the last part of the *Explanation*, which lays down that the Income-tax Officer may lawfully have recourse to one mode of recovery notwithstanding that the tax due is being recovered from an assessee by another mode. The *Explanation* itself starts by saying

that if some action is taken to recover the whole or any part of the sum within the period of limitation prescribed, a proceeding for the recovery shall be deemed to have commenced within the meaning of the section. What this provision contemplates is clearly that the adoption of one mode of recovery (specified in the section) by the Department does not exclude the simultaneous adoption of another mode of recovery also specified therein. It declares that the several modes of recovery are not mutually exclusive; they do not affect in any way any other law for the time being in force relating to the recovery of debts due to Government. It accordingly enables the Department not only to put the several modes of recovery into operation at the same time, but also to proceed to recover the dues by other means outside the scope of the Income-tax Act. This *Explanation* clearly contemplates each mode of recovery, that is, the modes which are provided by the several sub-sections of section 46, as a distinct proceeding. By no possible means of interpretation can we arrive at the result, that each mode is itself severable into distinct transactions, and that any action under one particular mode does not mark the commencement of a proceeding for recovery with respect to some other action also taken under that mode. That is exactly what the learned counsel for the petitioner contends for in claiming that the notices issued in December, 1954, under section 46(5-A) to some debtors of the assessee will not mark the commencement of a proceeding for recovery in so far as the notice issued to the Bank of India in 1957 is concerned. It seems to us that not only is this interpretation in conflict with the clear wording of the provision, but such a view would also lead to enormous practical difficulties. In the very nature of things, resort to section 46 (5-A) depends upon the knowledge secured by the Department that the moneys of the assessee are in the hands of this or that person. If the interpretation of the learned counsel for the petitioner is accepted, it would mean that the adoption of the mode of recovery contemplated by section 46 (5-A) will be limited to those debtors of the assessee who could become known to the Department within the period of limitation. If within the period of one year from the relevant date, the Department issues notices to certain debtors—A, B, C of the assessee—and recovers any part of the amount or fails to recover, then after the period of one year had expired, other debtors of the assessee would be rendered immune from the operation of this sub-section. This view seems also to be inconsistent with sub-section (5-A) itself which states that:

> " The Income-tax Officer may at any time or from time to time by notice in writing require any person from whom money is due. . . . . . . "

While, no doubt, action under this provision must be taken in the light of section 46 (7) prescribing the period of limitation, a mode of recovery commenced under this section within the period of limitation will, to our minds, enure in favour of the Department even in respect of notice issued subsequent to the expiry of the period of limitation to a newly discovered debtor of the assessee. What is important in the application of the various provisions of section 46 is that any mode of recovery must be started within the period of limitation, not that the same mode of recovery becomes a different mode, in so far as different persons are concerned.

In the reply affidavit of the petitioner, a contention of considerable importance has been put forward. It is shortly that in order that the Department might resort to more than one mode of recovery at the same time, the *Explanation* to section 46 (7) requires that special reasons should be recorded by the Income-tax Officer. The concluding part of the *Explanation* reads :

> " and it shall be lawful for the Income-tax Officer, if, for any special reasons to be recorded, he so thinks fit, to have recourse to any such mode of recovery, notwithstanding that the tax due is being recovered from an assessee by any other mode. "

We have earlier found that one mode of recovery was commenced by the Department by the issue of the certificate to the Collector under section 46 (2) of the Act on 29th October, 1953. We are not at present entering into the larger question; it is not necessary for us to do so, whether having started proceedings under one mode of recovery within the period of limitation, it is open to the Department to resort to another mode of recovery after the expiry of the period of limitation. We have

also stated and it is common ground that the proceedings for recovery under section 46 (5-A) of the Act were started in respect of some constituents of the assessee by issue of notices in December, 1954, which independently of the action under section 46 (2) was also within the extended period of limitation. We have found that in so far as the notice under section 46(5-A) to the Bank of India, Ltd., is concerned, it is in pursuit of the same mode, that is, the mode under section 46-(5-A) which had been commenced even in December, 1954. But the important point to consider is whether having resorted to the mode of recovery contemplated by section 46(2) of the Act, the Income-tax Officer could not resort to the mode of recovery under section 46(5-A) without recording special reasons as required in the *Explanation*. This part of the *Explanation* makes it clear beyond doubt that in the absence of any such special reasons, it shall not be lawful to resort to an additional mode of recovery. On behalf of the Department, Sri Rama Rao Sahib argued that this restriction upon the adoption of more than one mode is designed to operate only against the adoption of methods of recovery under any other law for the time being in force relating to the recovery of debts due to the Government, and that this requirement of special reasons to be recorded does not apply to the adoption of one or other of the modes set out in section 46. We are unable to accept this interpretation. This part of the *Explanation* lays down the following :—

(1) The several modes of recovery specified in this section are not mutually exclusive ;

(2) Recourse to one mode of recovery while tax is being recovered from an assessee by any other mode is permissible, but shall be only for special reasons to be recorded ; and

(3) The right to recover available under any other law for the time being in force relating to the recovery of debts due to Government is unaffected by the modes of recovery under section 46 and the adoption of methods outside the Act for recovery does not require the recording of special reasons.

The specific reference to the "several modes of recovery specified in the section" earlier in the *Explanation* and to "any such mode of recovery" and "any other mode" in the later part of the section can have no other significance except that the modes of recovery in the later part refer only to the several modes of recovery specified in the section. The last part of the section dealing with "any such mode of recovery" cannot, as argued by Sri Rama Rao Sahib, be read as relating to methods of recovery outside the scope of the Income-tax Act. It accordingly follows that before the Income-tax Officer could take any steps under section 46(5-A) of the Act, while proceedings for recovery under section 46(2) of the Act were already on foot, he should record special reasons why the adoption of an additional mode was necessary. If no such reasons are recorded, it should necessarily follow that the latter proceeding are not lawful.

On behalf of the Department, Sri Rama Rao Sahib, has been compelled to concede that no special reasons were recorded by the Income-tax Officer. The result is inevitable that the entire proceedings under section 46 (5-A), whether of 1954 or 1957, stand vitiated thereby. We are of the view that on this narrow ground the petitions succeed.

Rule *nisi* is made absolute. The petitioner will be entitled to his costs in W.P. No. 603 from respondent 1. No order as to costs in W.P. No. 604 of 1957. Counsel's fee Rs. 250.

K.L.B. —— *Rule* nisi *made absolute*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Velusami and another .. *Appellants**

v.

Velusami Konar and others .. *Respondents.*

Registration Act (XVI of 1908), sections 17 and 49—Scope—Partition lists signed by the Parties—When requires registration—Admissibility in evidence—Unregistered deed of assignment of mortgage debt—Admissible in evidence to prove the transfer of the debt without the security.

An unregistered deed of assignment of a mortgage debt by the mortgagee would validly operate to transfer the debt covered by the mortgage apart from the security and the deed would be admissible in evidence for that purpose.

A partition is not one necessarily to be effected by writing or by a registered instrument. If however the parties to the partition embody the transaction in writing the question of registerability would arise under section 17 of the Registration Act.

The provisions of section 17 of the Act are clear that a document for which registration is compulsory should by its own force operate or purport to operate, to create or to declare some right or interest in immovable property. A mere recital of what had already taken place or the mere fact not by itself creating or purporting to create a title would not be held to declare any right, and there would be no necessity to register the document.

The question whether a document requires registration has to be decided on the terms of the document itself. When a document is clear resort cannot be had to other evidence to show that it is other than what it is or purports to be.

Section 49 of the Registration Act would prevent the unregistered document requiring registration under section 17 of the Act from being admitted in evidence. Secondly evidence of the factum of partition would not be admissible by reason of section 91 of the Evidence Act. But even in such a case if all the terms of the bargain have not been reduced in the document the document embodying a few of the terms of the bargain the mere fact that the document is inadmissible could not prevent the reception of secondary evidence of the agreement as it could not be held that the document was tacitly considered by parties as the complete or the only repository and the appropriate evidence of their bargain.

Where the document is not clear or where the expressions used therein are ambiguous it would be open to the Court to consider the evidence of the surrounding circumstances to ascertain whether the parties intended that document to be part of the bargain or whether it was a mere record of a completed transaction.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge, Madurai, dated 23rd December, 1954 and passed in Original Suit No. 35 of 1953.

T. R. Srinivasa Ayyangar, for Appellants in Appeal No. 272 of 1955 and for Respondents 4 and 5 in Appeal No. 425 of 1955.

M. Natesan, for Respondents 1 to 3 in Appeal No. 272 of 1955.

K. V. Srinivasa Ayyar, for 4th Respondent, in Appeal No. 272 of 1955 and for Appellant in Appeal No. 425 of 1955.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—These Appeals arise out of the decree and judgment in O.S. No. 35 of 1953 on the file of the Sub-Court, Madurai. Plaintiffs and 4th defendant are appellants in Appeals Nos. 272 and 425 of 1955 respectively. The suit was one for partition of the plaintiff's share in the properties set out in schedules A to F to the plaint. The A schedule properties had been dedicated to a trust and the parties are agreed that the trust was a private one ; the only dispute between

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* Appeal Nos. 272 and 425 of 1955 and Memorandum of Objections in Appeal No. 272 of 1955. — 31st July, 1959. (9th Sravana, 1881, Saka.)

them is regarding a scheme for management of the performance of the trust. The B schedule relates to the lands, C schedule to a house, D and E schedules to the two outstandings and a business, and F schedule to shares in Sri Meenakshi Mills alleged to be owned by the family.

One Chokalinga owned the properties. He left behind him two sons, Velusami and Tirupathi who are respectively 1st and 4th respondents in A.S. No. 272 of 1955 and the 4th respondent and appellant in A.S. No. 425 of 1955. It will be convenient to refer to the parties according to their rank in A.S. No. 272 of 1955. The appellants are the son and grandson of Tirupathi, the 4th respondent, while the 2nd and 3rd respondents are the sons of the 1st respondent Velusami. Respondents to the appeal are defendants 1 to 4 in the suit. Two others, namely, defendants 4 and 5 represented a collateral branch of the family in the suit, but they have not been made parties to the appeals. Their interest is only in regard to the management of A schedule properties.

The case for the appellants was that respondents 1 to 4 formed members of a Hindu joint family which owned the properties set out in the various schedules to the plaint, that there were some attempts for partition through mediation in the year 1950 and that although a tentative arrangement was made there was no final or effective partition. The appellants stated that they were entitled to their share in all the properties of the family and repudiated the claim to jyeshtabagham on the part of the first respondent. The 4th respondent supported the claim of the appellants. Respondents 1 and 2 contested the claim. They pleaded that there was a completed partition of the family properties in the year 1950 during which the first respondent made a claim that he must be given increased share (jyeshtabagham) as a reward for the services he rendered to the family by improving its prosperity, and the mediators who effected the partition allotted to him, in addition to his share, about 5 acres of land and Rs. 5,000 cash. The further case of the 1st respondent is that the 4th respondent as well as his son, the 1st appellant, accepted the arrangement and that they should not be allowed to go behind it. The question, whether there was a completed partition in the year 1950, was the substantial issue in the suit. There were also other subsidiary questions in regard to the extent of the properties that would be available for partition.

When the trial of the suit commenced, the parties filed a joint memo. on 11th December, 1954, under which they agreed, without prejudice to their contentions, to re-partition the properties, subject to the determination by the Court, the right of the 1st respondent to retain the 5 acres of land and the sum of Rs. 5,000 which was given to him under the previous partition. The other questions left to be decided were whether respondents 1 and 4 were in possession of any and what jewels of the family in regard to two items of outstanding and accountability in regard to a business left in charge of the 4th respondent. For decision of the first of the above questions it became necessary to decide whether there was a partition in the year 1950 in which the parties agreed to give jyestabagham to the 1st respondent and did give 5 acres of land and Rs. 5,000 cash.

The learned Subordinate Judge held that the alleged partition in the year 1950 was true, and that the appellants were aware of it and assented to the same. As regards the jewels, he held that there was no evidence of the existence of any jewels in respect of which either the first or 4th respondent would be liable to account. As regards the outstandings, he held that the parties would be entitled to divide those mentioned in Exhibit B-52 except item 136 mentioned therein. Accounting was directed in regard to the outstandings of the javuli business run by the 4th respondent. As regards A schedule properties, the learned Subordinate Judge held that the trust was a private one, and that the parties would be entitled to manage the trust properties by turns. He framed a scheme for such management by taking a period of six years and giving defendants 5 and 6, the members of the other branch, right to manage in every alternative year, and the remaining three alternate years were allotted to the first respondent, 4th respondent and the appellants. The

effect of these findings was that the learned Subordinate Judge accepted 1st respondent's case, that the partition of the year 1950 was a valid one, which had the effect of validating the allotment to the 1st respondent of the five acres of land and a sum of Rs. 5,000 given to him as jyeshtabagham for the services rendered by him to the family. The plaintiffs to the suit, aggrieved by the judgment of the lower Court, has filed the appeal, questioning the title of the 1st respondent to the jeyshtabagham and the finding of the lower Court in regard to the existence of family jewels with the first respondent. The latter claim, that is, for jewels, was not, however pressed before us. The 4th respondent has also filed an appeal, A.S. No. 425 of 1955, disputing the factum of allotment of properties by way of jeyshtabagham. Respondents 1 to 3 in their turn, have filed a memorandum of cross-objections in A.S. No. 272 of 1955, objecting to the judgment of the lower Court in so far as it rejected their claim for account in respect of the jewels alleged to have been retained by the 4th respondent. In addition, they have complained against the scheme of management of the trust properties, contending that the appellant's branch had been given 2/3 share in the one-half right that would properly belong to both, while they were only given 1/3rd share in the half right and that they would, in law, be entitled to one-half.

Three questions, therefore, fall to be decided :—

(1) Whether the partition of the year, 1950, is true and valid, under which the 1st respondent was allotted additional properties as and for him jyeshtabagham?;

(2) Whether the 4th respondent is in possession of any jewels belonging to the family and whether he is accountable in respect of the same?, and

(3) What is the proper scheme for the management of the trust properties?. On the 1st question, Mr. Natesan, the learned Advocate for the respondent, did not contend that the 1st respondent would be entitled to jeyshtabagham by virtue of any custom or law. His contention was that the parties having agreed to make an allotment of additional properties to him (the 1st respondent) in consideration of his services to the family, the agreements should be held to be lawful and should not be allowed to be repudiated by merely calling the claim as one of allotment by way of jeyshtabagham.

The case for the appllants is that there was no completed partition in the year 1950, that any arrangement that was entered into then could only be a tentative one, and that the allotment in such a partition for jeyshtabagham would be invalid. It was their further case that, even if there was a partition between the first and 4th respondents, such a partition would not be binding on them, as it could not be said to be fair or equitable. It is admitted that partition proceedings commenced towards the end of 1949 and according to the 1st respondent, it was concluded in February 1950 and was a final partition agreed to by the parties. In support of his case, the first respondent filed Exhibits B-52, B-55 and B-63. Exhibit B-52 is an *ainthugai* or balance sheet of the outstanding due to the family prepared on 20th May, 1950. That sets out all the outstandings due to the family, and towards the end of the document we find a recital to the following effect :—

"In the *ainthugai* (balance sheet) deducting the credit of Rs. 2,153-1-3 in the name of Sami (God) and matam from the cash balance and of the outstanding of Rs. 19-8-0 due from Murugesan Pillai, and Rs. 103-8-0 due from Ayya Konar and Rs. 5,178-12-0 due from B. Rajambal in all of the total outstanding of Rs. 5,301-12-0. P.M.S.V. (1st respondent) shall collect and take as and for his jeyshtabagham Rs. 5,000 (five thousand) and Pechimuthu shall collect and take Rs. 301-12-0 and balance of outstanding and balance at hand shall be divided equally by casting lots."

This document is signed by the 1st and 4th respondents. Four panchayatdars have also attested along with the writer.

Exhibit B-55 is a list of properties. The heading of the document is as follows :-

"Particulars of property got by P. M. S. Velchami Konar (1st respondent) as his share in thiruvilla cheetu (casting of lot)."

The details of the properties allotted to the 1st respondent are then set out. That was followed by a recital (which has been separately marked as Exhibit B-59 to this effect :—

> "Nanja land in Kathekkurar land survey Nos. 1-5, comprised have been given exclusively to S. P. Veluchami Konar (1st respondent) as jyeshtabagham as his own from and out of the said patta No. 50 ".

The document is signed by the 1st and 4th respondents and attested by the panchayatdars and the writer.

Exhibit B-63 is a list of outstandings allotted to the 4th respondent. That is subscribed to by respondents 1 and 4 and attested by the same persons.

The arbitrators have been examined as P. Ws. 2 to 5. They speak to the partition and allotment of jeyshtabagham. They also speak to the fact that the partition proceedings started as early as November, 1949 when it was agreed that the 1st respondent should be given jyeshtabagam, that they decided that he should be given 5 acres of land and Rs.5,000 in addition to his legitimate share, and that those properties were set apart and the remaining properties were divided between the two brothers.

The learned Subordinate Judge, acting on the evidence afforded by these documents and arbitrators, (whose respectability was not disputed) came to the conclusion that there was a partition as alleged by the 1st respondent.

The learned Advocate for the appellants contended that Exhibits B-52, B-55 and particularly the portion marked as Exhibit B-59 and B-63 would not be admissible in evidence and that if the evidence offered by those documents were excluded, there would be no evidence in this case to prove as to what properties fell to the shares of the 1st and 4th respondents.

In such a case it was contended that the properties should be divided afresh, and, as under the law, the first respondent would not be entitled to anything extra, the properties should be equally divided. Exhibit B-52 purports to assign a debt due from B. Rajambal valued at Rs.5,000 towards the jeyshtabagham claimed by the first respondent. It is contended that the debt due from Rajambal was secured by a mortgage, and the transfer being one of immovable property, the document would be inadmissible in evidence in the absence of a registered instrument. On the terms of the document, it is not clear whether the assignment of the outstanding was by virtue of Exhibit B-52, or that document was only a record of previous oral release by the other sharer in favour of his co-sharer as a part of the partition arrangement. The words used are :—

"ஜேஷ்ட பாகத்திற்காக எடுத்துக் கொள்ள வேண்டியது போக."

Those words are quite consistent with the case of the first respondent that the release had been made already. The utmost that could be said in favour of the appellant is that the expressions used are of ambiguous import. In that case other evidence has to be looked into for deciding whether the words used intended to convey title in respect of the mortgage. It is however unnecessary to consider that aspect of the matter, as we are satisfied that the document could, even if it were held to be a deed of assignment, validly operate to transfer the debt covered by the security. In *Elumalai Chettiar* v. *Balakrishna Mudaliar*[1] it was held that the law did allow the mortgagee to transfer the debt as an unsecured or simple debt without a registered instrument if he thought fit to do so, for the security was for his benefit, and he could give it up if he liked and the transferee would then get the right to the debt, but not the security. In *Imperial Bank of India* v. *Bengal National Bank* (In Liquidation)[2] the Privy Council upheld the possibility of the transfer of a debt without a transfer of security on the ground that separation between debt and security was so well

1. (1921) 41 M.L.J. 297 : I.L.R. 44 Mad. 965.
2. (1931) 61 M.L.J. 589 : L.R. 58 I.A. 323 : I.L.R. 59 Cal. 377 (P.C.).

established that a creditor would be entitled to take the debt without having recourse to the security. In our opinion even if Exhibit B-52 were to be construed as transfer of a mortgage debt, the document could validly operate to transfer the debt covered by the mortgage, apart from the security, and would be admissible in evidence for that purpose. That document shows that there was an allotment of a sum of Rs.5,000 towards jyeshtabagham. This is corroborated by the other evidence in the case, which shows that it was part of the partition arrangement entered into between the parties in the year 1950.

The admissibility of Exhibit B-55 has then to be considered. The title of the document would appear to indicate that the partition had concluded and that it merely purported to record the arrangement. It is contended that the portion of that document, relating to the allotment of property in lieu of jyeshtabagham, Exhibit B-59, purported to affect immovable property and would render the document liable for registration under section 17 of the Registration Act. Exhibit B-59 is to the effect that five acres and three cents of land have been exclusively given to the first respondent for jyeshtabagham. That, however, is not a conveyance. A right to jyeshtabagham arises only on partition, and it is not the case of any of the parties that jyeshtabagam could be or was given independent of any partition arrangement. It is a part of a partition and cannot amount to a conveyance. A partition is not one of those transfers necessarily to be effected by writing or by a registered instrument. The Transfer of Property Act, which requires a registered instrument in the case of transfer of immovable properties, does not require that a release, surrender, or partition of immovable properties should be affected by a registered instrument, or even by a writing, although in one sense each of them involves a transfer of property. A partition between coparceners, or co-owners, partakes the character of a release and conveyance, and it cannot be said to be either a sale or an exchange. No writing would, therefore, be necessary for a partition. If, however, the parties to a release, surrender or partition embody the transaction in writing, the question of registerability would arise under the provisions of section 17 of the Registration Act. The Registration Act provides for registration of documents . Section 17 (1) of the Registration Act, so far as it is relevant for this case, states :—

" The following documents shall be registered.

(a) . . . .

(b) other non-testament instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in the immovable property. . . . . . "

It is clear from the provisions of the section that a document, for which registration is compulsory, should, by its own force, operate or purport to operate, to create, or declare some right or interest in immovable property.

In *Sakharam Krishnaji* v. *Madan Krishnaji*[1], West, J., dealing with section 17 of the Registration Act, observed :—

" There ' declare ' is placed along with ' create ', ' assign ', ' limit ' or ' extinguish ' a ' right, title or interest ' and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word ' declare '. It implies a declaration of will, not a mere statement of fact, and thus a deed of partition which causes a change of legal relation to the property divided amongst all the parties to it is a declaration in the intended sense ; but a letter containing an admission, direct or inferential, that a partition once took place, does not ' declare a right within the meaning of the section."

A mere recital of what had already taken place or the mere fact, not by itself creating or purporting to create a title, could not be held to declare any right and there would be no necessity to register the document.

In *Bageshwari Charan* v. *Jagarnath Kurai*[2], the Privy Council accepted the view of West, J., *Sakharam Krishnaji* v. *Madan Krishnaji*[1]. They emphasised the dis-

1. (1881) I.L.R. 5 Bom. 232.
2. 62 M.L.J. 296 : L.R. 59 I.A. 130 ; I.L.R. 11 Pat. 272.

tinction between a mere recital of fact and something which by itself created a title.

The question whether a document requires registration has to be decided on the terms of the document itself. When a document is clear, resort cannot be had to other evidence to show that it is other than what it is or purports to be.

A partition, although effected orally, if subsequently reduced into a form of document and that document purports by itself to effect a division and embodies all the terms of bargain, would require registration. The reason is not that the transaction required a registered instrument, but that the document purported to declare, or create, or affect an interest in immoveable property. In such a case if the document be not registered, section 49 of the Registration Act would prevent its being admitted in evidence. Secondary evidence of the factum of partition would not be admissible by reason of section 91 of the Indian Evidence. Act. Vide *Ramayya* v *Achamma*[1]. But even in such a case if all the terms of the bargain between the parties have not been reduced in the document, the document embodying only a few of the terms of the bargain, the mere fact that the document was inadmissible could not prevent the reception of secondary evidence of the agreement, as it could not be held that the document was tacitly considered by the parties as the complete, or the only repository and the appropriate evidence of their bargain.

In a case where the terms of a document are clear, and they do not purport to create, or purport to create interest in immovable property, extrinsic evidence cannot be let in to show that it was intended to have that effect. That is based on the principle that where a document is clear, the intention has got to be gathered from the terms of the document and not by resort to other evidence.

Where however, the document is not clear, or where the expressions used therein are ambiguous, it would be open to the Court to consider the evidence of surrounding circumstances to ascertain whether the parties intended that document to be part of the bargain or whether it was a mere record of a completed transaction. To ascertain the precise intention of the parties, certain tests are generally applied. These are however, merely tests, and no one of them could be held to be decisive of the question of registerability which depends on what the document professes to be or purports to do. In *A reference under section* 49 *of the Stamp Act*[2], a document was signed by the members of a Hindu family and attested by witnesses. It purported to be an account or list of the share of one member of the family in the family property. It was recited therein that the parents of that member were to enjoy certain lands and that the outstanding debts should be divided. A question arose whether the document had to be stamped as instrument of partition. The learned Judges held that the document was nothng more than a note that a certain property had, on partition, been allotted to the maintenance of parents, and memorandum of the particulars of property which had on partition, fallen to the share of the brothers, and that it did not of itself operate to release the joint interests of the other parties to the partition and create a sole interest in the person in whose share it recorded. In that case the heading of that document was " descriptive account of Rajappa Mudali's share ". That circumstance was held not sufficient for liability to stamp duty.

In *Gnanamuthu Nadan* v. *Velukanda Nadathi*[3], the partition lists containing a list of the properties which fell to the share of a sharer in a partition, though they were signed by the co-sharers and duly attested, were held not to require registration when they contained no words which could be construed as creating partition of status. In that case the heading of that document gave the name of the particular sharer and set out various items as his share. The list was signed and attested, and it bore a date. It was found in evidence that the lists were drawn by lots in the names of individuals, to whose share the items fell. The learned Judges held that the written deed could be treated only as minutes of agreement and not a completed

1. (1944) 2 M.L.J. 164 : I.L.R. (1945) Mad. 160.
2. (1884) I.L.R. 7 Mad. 385.
3. (1923) 19 L.W. 494.

partition, and that, though unregistered could be admitted in evidence. In *Bapayya* v. *Ramakrishnayya*[1], it was held that where unregistered partition lists were sought to be put in evidence for the purpose of proving a partition between the parties, the question to be decided was whether the documents constituted the bargain between the parties, or they were merely the record of an already completed transaction, the question being whether there was a sufficient dissociation of the transaction from the documents. The learned Judges also held that the matter would not depend on the interval of time between the transaction and the document, though in a case where interval was long the dissociation might be more readily inferred. We sent for the records in that case and examined the contents of the partition list which was held to be admissible. The list in that case was more formal than Exhibit B-55 in the present case. In addition to the list of the properties that fell to the particular sharer, certain covenants had been embodied. Notwithstanding that circumstance, the learned Judges had no difficulty in holding that the partition had become a *fait accompli* before the lists were prepared and the latter did not form an essential part of the division of the property and it was, therefore, admissible in evidence though unregistered. To a similar effect is the decision of a Bench of this Court in *Panchapagesa* v. *Kalyanasundaram*[2].

In *Subba Rao* v. *Mahalakshmamma*[3], certain partition lists were sought to be let in evidence of a partition. They were witten in duplicate, signed by each of the co-sharers and attested . The documents were construed as intended to be evidence of a partition, and in the absence of registration the lists were held not admissible in evidence to prove partition. Beasley, C.J., stated that the question whether a document was a deed of partition or a mere memorandum of partition was one of fact to be decided on a perusal of the actual document. With respect to that learned Chief Justice, we cannot accept that statement of the position as correct. The question of construction of a document is always one of law. We have pointed out already that the question whether a document is registerable under the provisions of section 17 of the Registration Act would depend only on its terms. In case, however the terms are not clear, other evidence could be looked into to find out whether the document formed part of the transaction which, if reduced to a document, would require registration. The learned Chief Justice appears to have rested his conclusion in that case on the circumstance that the document before him, being signed, should be held to be intended to itself effect the partition. We cannot agree with the learned Judge when he laid down that a signature of a party to a document would be decisive of the question as to whether the document was intended to effect partition. As we have already pointed out, the formality of a document would be one of the several tests which should be applied in a case where the terms of document are, by themselves, obscure or ambiguous. The mere fact that certain formalities were observed in a document would not by itself show that the document was intended to operate to create interest in the property. Curgenven, J., however, did not base his conclusion on that reasoning. At page 48, the learned Judge observed :—

> "We have to consider whether, in the terms of section 17 of the Registration Act, Exhibit VII 'purports. or operates to create, declare, assign, limit or extinguish, whether in the present or in future, any right, title or interest in immovable property', and the first test to apply is whether the document formed an essential part of the process of dividing the property or whether there is ground to suppose that the partition had already taken place, perhaps by oral arrangement, and was complete when the document was executed."

We respectfully agree with the statement of law made by the learned Judge. In *Ramanathan Chettiar* v. *Ramanathan Chettiar*[4], the document, though it recited the prior drawing of lots, embodied the terms of the partition arrangement, including the allotment of different portions of the house to the two sharers and the covenants entered into between them regarding the upkeep of the house and the sharing of the common expenditure. The learned Judges construed that document as

1. (1938) 1 M.L.J. 582.
2. A.I.R. 1957 Mad. 472.
3. (1930) 59 M.L.J. 558 : I.L.R. 54 Mad. 27.
4. (1949) 2 M.L.J. 751.

embodying a division by metes and bounds and not merely recitals of a completed partition. In *Muhammad Ghouse Sahib* v. *Jamila Bi*[1], a partition *koor* chit embodied all the terms of partition, which had a preamble, and the operative portion therein mentioned what were the properties to be allotted to various sharers. Provision was made for the discharge of debts by selling specified properties and by dividing the balance, and it finally recited that there was no other property to be divided. The document was signed by all the parties and attested by a number of witnesses. Although the document contained a further clause providing for the execution of a proper partition deed between themselves, it was held that the words of the document did operate to create a partition and therefore required registration. To a similar effect is the decision in *Radhakrishnayya* v. *Sakuntala*[2],. The three cases cited above are instances where the Court on a consideration of the recitals in a document held that it did or purported to affect immovable property and therefore required registration. They do not support the broad contention sought to be advanced, that wherever the parties signed the partition lists they should be construed as affecting immovable property and they were therefore inadmissible without being registered.

In our opinion, the terms of Exhibits of B-59 and B-52 are clear and they only record the completed transaction of partition. Even if it were to be held that the words were of ambiguous import, we are satisfied on the other evidence in this case that the partition was completed before the lists were prepared, and that the lists were intended merely as record or minutes of the previous partition. We have already referred to the fact that Exhibit B-52 was executed two days earlier than Exhibit B-55 which embodied division of immovable properties. In Exhibit B-52 itself there is indication that partition had been completed already. That apart, the evidence of the arbitrators make it clear that the partition which commenced in November, 1949 was completed before the lists were prepared. Under the circumstances, we are of opinion that the partition lists were mere record of a previously completed partition between the parties, and they, being mere records, would be admissible in evidence. It is not disputed that if Exhibits B-52 and B-55 were received in evidence the partition should be held to have been proved.

It was next contended that the partition, even if true, would not bind the appellants. The learned Subordinate Judge held that the first appellant was fully aware of the partition proceedings of the year 1950 and that he was present at the time of division of the properties and consented to the jyestabhagam being given to the 1st respondent at the division of the properties. Mr. T.R. Srinivasan, the learned Advocate for the appellants, contested the correctness of this finding and referred us to Exhibit B-24, a notice sent in reply to Exhibit B-23. He contended that in that notice there was no mention of the appellants having been present at the time of the allotment of jyestabhagam, and that, therefore, the present case of the 1st respondent, that the first appellant was a party to the arrangement, should have been an afterthought. Exhibit B-24 is a notice sent by the 1st respondent to the 4th respondent's Advocate and not to the appellants. There was no necessity, or even an occasion to mention in that notice about the presence, or the acceptance of the appellants of the partition arrangement. We cannot believe P.W.-2, the first appellant, when he says that he was not aware of the partition proceedings in the year 1950. The partition was a long drawn out affair, which commenced some time in November, 1949, and lasted till February, 1950. We agree with the conclusion arrived at by the learned Subordinate Judge that the first plaintiff was an assenting party to that arrangement. It follows that the appellants would be bound by the arrangement of 1950 which allotted a jyestabhagam to the appellants.

The F schedule to the plaint sets out certain shares in Sri Meenakshi Mills held by the family. It was not disputed in the lower Court that the plaintiffs would be entitled to a share therein. The appellants would be entitled to their share in the F schedule.

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1. (1950) 1 M.L.J. 151.
2. (1950) 2 M.L.J. 238.

A memorandum of cross objections has been filed by respondents 1 to 3. It is contended by them that the 4th respondent would be liable to account in respect of certain jewels of the family. This question has been considered in paragraph 23 of the judgment of the learned Subordinate Judge. It has not been shown to us that the learned Judge is wrong. We accept his finding that it has not been shown that the 4th respondent has any jewels of the family in his hands, or that he is in any way liable to account for the same.

The next question is in regard to the scheme to be adopted for the management of the trust properties and the performance of the *mandagapadi* under Exhibit B-1. It has not been disputed before us that the trust is a private one, and that defendants 5 and 6, representing one branch, would be entitled to a half right and respondents 1 and 4, between themselves would be entitled to the other half. When a partition is effected between the 1st and 4th respondents, the 4th respondent, representing his family would be entitled to only 1/4th of the whole right and the first respondent to the other 1/4th. If a partition is to be effected between the 4th respondent and the appellants, it follows that 1/4th right of the former should be divided between themselves, and the appellants would be entitled to half of that, namely, 1/8th. Therefore, for any proper scheme of management, a period of 8 years has got to be taken and the parties will have their turn of management during that period. But the learned Subordinate Judge has taken only a period of six years and gave the 5th and 6th defendants a turn in the management of the trust properties in alternate years, commencing from fasli 1364. He gave in the intervening years one turn each for the first and the 4th respondents and the appellants. That would mean that the appellants and 4th respondent would, between themselves, be able to take 2/3 share of the 1/2 right vesting in that branch. To this they are not entitled. We consider that the scheme should be for a period of 8 years. Unfortunately defendants 5 and 6 have not been made parties to the appeal. But as the arrangement which we propose to make will not in any way prejudice or affect them, we consider that the scheme formulated by the lower Court could be modified in their absence. In modification of the decree of the lower Court we direct that the parties will have their respective turns of management of the trust thus :—

1st year	defendants 5 and 6	1958-59
2nd year	defendant 1	1959-60
3rd year	defendants 5 and 6	1960-61
4th year	defendant 4	1961-62
5th year	defendants 5 and 6	1962-63
6th year	defendant 1	1963-64
7th year	defendants 5 and 6	1964-65
8th year	plaintiffs	1965-66

and this turn will be repeated thereafter in the succeeding years. During the pendency of the appeals, we passed an interim order enabling the appellants to perform the Adi Festival. That year 1959-60 would properly be the first respondent's turn. The (1st respondent) has no objection to the appellants conducting Adi Festival and he is willing to take up the management for the rest of the year. We, accordingly, direct that the rest of the period in 1959-60 will be the first respondent's turn of the management and the turn thereafter will be according to the scheme mentioned above. With these modifications the appeals are dismissed with costs of the contesting respondents in A.S. No. 272 of 1955. The memorandum of cross-objctions is also dismissed but without costs.

V.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMAKRISHNAN.

M.A. Mohamed Burhanuddin .. *Petitioner**

v.

The Official Trustee of Madras .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *sections* 30 *and* 35—*Effect of—Proceedings pending against orders under the earlier Act—If could be continued.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 4—*Fixation of fair rent—Principles of.*

It is no doubt true that section 30 of the Madras Act XVIII of 1960 exempts certain category of buildings (non-residential buildings) from the operation of the Act. But section 35 (2) of the Act gives continuing effect to the Rules, Notifications and decisions given under the earlier Act XXV of 1949 and they are deemed to be under Act XVIII of 1960 for the purpose of giving prospective effect. Act XVIII of 1960 does not purport to take away the right of appeal or revision vested in a person under the earlier Act. Where the rights of parties were governed by the earlier Act till the passing of the new Act and a revision petition by the aggrieved party was pending the party will be entitled to obtain his remedy in the Revision under the old Act and section 30 of the new Act cannot divest him of that right.

In fixing fair rent under section 4 of the Madras Act XXV of 1949 the discretion given to the Controller to allow an increase in the rental value as entered in the Corporation books during the basic period, is limited to the maxima provided under section 4 (4) of the Act. In fixing the fair rent under the Act the Court should no doubt respect the contract between the parties so long as the contract does not provide for a rent that exceeds the maximum fixed by the statute. But in cases where the rent agreed upon under the contract exceeded the maximum fixed by the Statute, then on the principle that the tenant cannot contract himself out of the statute which gives him certain privileges he should be given relief. The tribunals under the Act cannot fix a fair rent and impose other collateral obligations on the tenant regarding payment of tax etc. All the obligations under a contract should be taken into consideration in arriving at a fair rent, which should be fixed as a definite sum.

Petition under section 12-B of the Madras Buildings (Lease and Rent Control) Act, 1949, praying the High Court to revise the order of the Court of Small Causes, Madras, dated 3rd April, 1959 and made in H.R.A.No. 176 of 1958 (H.R.C.No.108 of 1957 on the file of the Court of the Additional Rent Controller, Madras).

V. Govindarajulu, for Petitioner.

O. Radhakrishnan, for Respondent.

The Court delivered the following

JUDGMENT.—This Revision Petition is filed against the decision of the Second Judge, Court of Small Causes, Madras, in H.R.A. No. 176 of 1958, which in turn was an appeal against the decision of the Additional Rent Controller, Madras, in H.R.C. No 108 of 1957. This Revision Petition is filed in the following circumstances.

The Official Trustee of Madras leased to one Mohamed Burhanuddin (Petitioner in this Revision Petition respondent before the lower appellate Court and Petitioner before the Rent Controller) certain premises, compendiously known as the Connemara Market in Pudupet, on a rent of Rs. 29 per day under a written agreement between the parties dated 25th December, 1952. For the sake of convenience, I will hereafter refer to Mohamed Burhanuddin as the tenant. The tenant filed H.R.C. No. 108 of 1957 complaining that the rent agreed upon was high and that it should be reduced and the fair rent fixed. The Official Trustee opposed the petition and urged that the tenant was collecting as much as Rs. 62 daily from the various stall-keepers in the market. However, the Rent Controller fixed the fair rent as Rs. 21-50 nP., per day. For arriving at the above decision the Rent Controller took into account the rental value of the premises as per the Corporation Records in 1939-40, together with an addition of 50 per cent. thereto. Against this decision the Official Trustee appealed to the Small Cause Judge, Madras. After discussing the evidence as to the exact amount which the tenant was able to realise

*C.R.P. No. 1477 of 1959. 17th November 1960.
(26th Kartika 1882, Saka.)

from his stall-keepers and sub-lessees, the learned appellate Judge came to the conclusion that the rent agreed upon between the parties was the fair rent to be fixed. Accordingly, he set aside the order of the Rent Controller and fixed the fair rent at Rs. 29 per day subject to the conditions stipulated in the lease deed of 1952, which imposed upon the tenant several collateral obligations like payment of licence fee, Corporation property tax, water supply charges, quit rent payable to the Government, white washing and colour washing and keeping the market in good sanitary condition and electrifying the market. From the said decision of the appellate Judge the present Revision Petition is filed.

The learned counsel appearing for the respondent Official Trustee urged a preliminary point. After the enactment of Madras Act XVIII of 1960, under section 30 thereof, the provisions of that Act (XVIII of 1960) will not apply to non-residential buildings the rental value of which as per the property tax assessment book of the Corporation, exceeded Rs. 400 per mensem. It is not in dispute that the premises we are now concerned with is a non-residential building and the rental value as per the entries in the Corporation records exceeds at the present time Rs. 400 per mensem. The learned counsel for the respondent referred to section 35 of the said Act which says :

"* * * * * *

(2) Notwithstanding the repeal of the said Act by sub-section (1)—

(a) All rules made, or deemed to have been made, notifications issued or deemed to have been issued, orders passed or deemed to have been passed, decisions made or deemed to have been made, proceedings or action taken or deemed to have been taken, and things done or deemed to have been done under any provision of the said Act (Act XXV of 1949) shall be deemed to have been made, issued, passed, taken or done by the appropriate authority under the corresponding provision of this Act and shall have effect accordingly.

(b) Any liability or penalty incurred or deemed to have been incurred, any punishment awarded or deemed to have been awarded, any application made or deemed to have been made and any prosecution commenced or deemed to have been commenced under any provision of the said Act shall be deemed to have been incurred, awarded, made or commenced under the corresponding provision of this Act."

The contention on behalf of the respondent was that the decision of the Rent Controller in this case, which was given on 30th May, 1958 and the decision of the appellate Judge which was given on 3rd April, 1959, both the dates being prior to the enactment of Act XVIII of 1960, should be deemed to have been decisions given under Act XVIII of 1960 and since the provisions of Act XVIII of 1960 are no longer applicable to a building like the one we are concerned with, this Revision Petition is not maintainable. There is an obvious difficulty in accepting this argument. The provision in section 35 (2) of the Act XVIII of 1960 was intended only for the purpose of giving continuing effect to the Rules made, Notifications issued and decisions given under the earlier Act, and for that purpose, though they were under the earlier Act, should be deemed to be under Act XVIII of 1960 for the purpose of giving prospective effect. But a person aggrieved by a decision under the old Act had under the provisions of that Act a remedy by way of appeal and also a further remedy by way of Revision. Act XVIII of 1960 does not purport to take away these rights which are vested in character. The mutual rights and liabilities between the Official Trustee and the tenant in regard to this building will be governed, in any event, up to the date when Act XVIII of 1960 was passed, by the decision of the appellate Judge in the matter of fixing the fair rent. The tenant is therefore an aggrieved party and he will be entitled to obtain his remedy by way of a Revision, under the Old Act, unless the new Act has specifically divested him of that right, which the New Act does not purport to do. Hence I overule the preliminary objection.

I will next take up the contentions of the tenant urged in this Revision Petition. The first contention of the tenant before me was that where a building has been assessed to a rental value in the Corporation Register at a particular amount in the year 1939-40, the increase of fair rent determined under the provisions of section 4 of the Madras Buildings (Lease and Rent Control) Act, 1949, should be limited to

the maximum prescribed in section 4 (4) (ii) which in the case of the present building, is 50 per cent. of the rental value recorded in the Coproration Books in 1939-40. No doubt, in determining the fair rent, the Rent Controller shall have due regard (i) to the prevailing rates of rent in the locality for the same or similar accommodation during the twelve months prior to 1st April, 1940 (section 4 (2) (*a*) of the Act); (ii) the rental value as entered in the property tax assessment books of the Corporation during the twelve months prior to 1st April, 1940 (section 4 (2) (*b*) of the Act) and (iii) to the circumstances of the case including any amount paid by the tenant by way of premium or any other like sum, in addition to rent after the 1st April, 1940 (section 4 (2) (*c*) of the Act). But section 4 (4) of the Act which states that in fixing the fair rent of non-residential buildings, the Controller may allow an increase not exceeding 50 per cent. of the rental value fixed in 1939-40, governs and restricts the directions given in section 4 (2), clauses (*a*), (*b*) and (*c*) extracted above. It was contended by the learned counsel for the petitioner that if this restriction is borne in mind, the decision of the Rent Controller making only an increase of 50 per cent. over the rental value of 1939-40 is correct and the decision of the appellate Judge making a further enhancement is incorrect. For the view that section 4 (4) restricts and controls section 4 (2) (*a*), (*b*), (*c*) the learned counsel for the petitioner relied upon the decision of the Andhra Pradesh High Court in *Ambavathi* v. *Superintendent, King George Hospital*[1]. That related to the case of a residential building and in the decision which was given by a Bench, it is observed at page 330 :

> " . . . . . in fixing the fair rent, his discretion is controlled by section 4 (3). . . It may be that, in some cases,. . . . injustice may be caused to a particular party ; but the Legislature for reasons best known to it fixed the maximum rent having regard to particular data."

I respectfully agree with the view set out above and I hold that in fixing the fair rent of a non-residential building the discretion given to the Rent Controller to make an increase over the rental value entered in the Corporation books in 1939-40 is limited to the maximum prescribed in section 4 (4) of the Act.

The further contention of the learned counsel for the petitioner is that the appellate Judge was wrong, in the circumstances of the case, to allow the contract between the parties entered into as per the lease agreement of 1952 to prevail over the restriction placd on the increase by the statute. For this position he relied on the decision in *George Oakes Ltd.* v. *The Chief Judge, Small Cause Court, Madras*[2], a decision under the Madras Buildings (Lease and Rent Control) Act, 1946, where at page 318 the following observations of the learned Chief Justice are found :—

> " . . . . . I would like to say someting about the doubt expressed by my learned brother whether the decision in *Raja Chetty's case*[3], would impliedly lead to the conclusion that the tenant can also contract himself out of the benefit conferred on him by the Act by taking a lease after the Act containing terms and conditions which operate to curtail the rights and privileges conferred upon him by the Act. There was no doubt in our mind that he could not. I would be prepared to go the length of holding that it would be against public policy and the spirit of the Act. The provisions of section 6 embody the principle that the tenant can be saved from the terms of an express agreement when such terms are to his detriment."

This view was followed in a later decision of this Court in *Ramalingam* v. *Gurumurthi Reddy*[4], where the tenant had taken lease of a cinema hall for one year. When the landlord sought to evict him on the ground that the lease was only for one year, the tenant urged the provisions of section 7 of the 1949 Act in his favour. It was held that the tenant could not contract himself out of the rights conferred on him by the Madras Act XXV of 1949 and that the tenant could take advantage of the provision of the said Act notwithstanding that the lease was for a specified period only. It was therefore contended, on behalf of the petitioner in this revision proceedings, that the tenant could claim that any increase in the rent payable by him should be limited to 50 per cent. of the rental recorded in the Corporation records in 1939-40, and that any contract he had entered into with the landlord regarding the rent payable by him should be upheld only if it provided for an increase within the maximum but if it

1. (1958) 2 An.W.R. 329.
2. (1950) 2 M.L.J. 317.
3. (1949) 2 M.L.J. 694.
4. (1954) 2 M.L.J. 752.

provided for an increase above this maximum, he would be relieved against that increase, notwithstanding that he himself had entered into a contract therefor.

The appellate Judge had relied upon the decision of Ramaswami, J., in *Subbier* v. *W.P. Chetty*[1], and also the unreported decision of Ramachandra Iyer, J., in C.R.P. No. 89 of 1957. These two decisions laid down that the Rent Controller should give effect to the terms which the parties had between themselves agreed upon. The decision of Ramaswami, J., is also authority for the view that the Rent Controller should interfere if it was found that the compromise has not been freely arrived at and there has been over-reaching of one party by the other. But it has to be pointed out that in these two cases the learned Judges did not have occasion to consider whether the contract provided for an increase over the statutory maximum and whether if it had so provided, the tenant could be relieved against the obligation which he had undertaken under the contract, and given the benefit of the statute. But that is the exact question that has arisen in the present case and it appears to me that the proper way of reconciling the position is to hold that the terms in the contract are to be respected as long as the contract does not provide for a rent that exceeds the maximum fixed by the statute. But if it exceeds the maximum fixed by the statute, then on the principle that the tenant cannot be premitted to contract himself out of the statute which gives him certain privileges he should be given relief. In view of the foregoing, I hold that the decision of the Rent Controller has to be affirmed and the decision of the appellate Judge has to be set aside.

It was also urged by the learned counsel for the petiioner that the appellate Judge was wrong in imposing upon the tenant the liability for a certain sum as a fair rent, and also several other collateral obligations like payment of Corporation Tax and so on, according to the terms of the lease deed. It was pointed out that in fair rent proceedings the Court should fix an exact amount payable as fair rent, and for such fixation it can take into account the obligations of the kind referred to ; but it cannot levy them as additional obligations to the payment of a fixed sum as fair rent. The decision in *Tej Singh* v. *Soora Subbarayulu Chetty*[2], relied upon by the petitioner's learned counsel is authority for the view that payment of taxes by the tenant would be one of the circumstances of which the Rent Controller should have due regard in fixing the fair rent under section 4 (2) of the Act. It appears to me that the proper course for the appellate Judge would have been to take all these obligations into account and fix a definite sum as fair rent.

The appellate Judge had observed that the tenant was getting nearly Rs. 62 per day and that the fixation of fair rent at Rs. 29 per day would leave him a very favourable margin. This was disputed by the petitioner before me. He referred to two documents in this connection. The Official Trustee had reported in Exhbit P-9 that Receivers appointed by the High Court collected during certain period in 1951 a certain sum, the average of which would work out to only Rs. 36 per day. Another document referred to in this connection was Exhibit R. 8, wherein some of the beneficiaries of the trust reported to this Court in 1957 that the lease may be renewed in favour of the present petitioner for rental of Rs. 21, per day. It was urged by the petitioner that this would show that the fair rent fixed by the Rent Controller at Rs. 21-50 nP. per day would not be unreasonable. But in view of the fact that the Rent Controller has already fixed the maximum payable under the Rules, and the tenant has not disputed the correctness of this fixation, it is not necessary to go into the question as to the exact amount of rent that he had received from his stall keepers. Admittedly, the petitioner has not maintained any account for his collections and without the maintenance of such accounts and in the absence of independent evidence, it would not be proper to arrive at an estimate of his actual receipts.

In view of my findings above, I hold that the order of the appellate Judge has been made without giving weight to the relevant provisions of the Buildings (Lease and Rent Control) Act and it has to be set aside. I accordingly set aside the order

1. (1958) 2 M.L.J. 583.
2. (1951) 1 M.L.J. 183.

of the appellate Judge and restore the order of the Rent Controller. This Revision Petition is allowed with costs.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Chinnadurai *alias* Ramachandran and others .. *Petitioners**

v.

The Court of Wards, Madras, represented through the Estate Collector of Sivagiri Estate .. *Respondent.*

Madras Court-Fees and Suits Valuation Act (XIV of 1955), sections 39, 48 and 50—Administration suit—Nature of relief claimed—Court-fee—If can be directed to be paid by the claimants under section 48 of the Act.

Where a plaint (though purported to be filed, as an inter-pleader suit) claims reliefs that the Court may take charge of the suit property and ascertain the shares of the contending parties and distribute the same, it is an administration suit attracting Court-fee under section 39 of the Court-fees Act and Court-fee has got to be levied after the shares are ascertained and before the decree is passed. Neither section 48 nor section 50 of the Court-fees Act could apply to such cases. An order on a Check-slip directing all the claimants to contribute the total Court-fee payable on the plaint under section 48 of the Court-fees Act cannot be sustained.

Petitions under Article 227 of the Constitution of India and under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Tirunelveli dated 30th March, 1960 and made in O.S. No. 3 of 1960 (Check. Slip No. 343/XIV Diary 55).

P. S. Sarangapani Ayyangar, R. Sundaralingam, T. R. Mani, for Petitioners.

G. Ramanujam for the Government Pleader (*A. Alagiriswamy*), on behalf of the Respondent.

M. Natesan, for 2nd Respondent.

The Court made the following

ORDER.—These petitions are directed against the order of the District Judge of Tirunelveli, directing that the nine claimants to the Sivagiri estate should equally contribute to the total Court-fee of Rs. 6,000 payable on the plaint in O.S. No. 3 of 1960. The Sivagiri estate was an impartible estate in the Tirunelveli District. The last Zamindar, Chinnathambiar, applied to the Court of Wards to take over the management of the Estate, as it was considerably indebted. The Court of Wards took management of the Estate. The Zamindari itself was abolished under the Abolition Act, and the Zamindari vested in the Government on 3rd January, 1951 under section 3 of the Abolition Act. Besides the compensation paid for the zamindari there were other properties, which belonged to the late Zamindar who died on 16th August, 1955. The Court of Wards, which was in possession of the estate, filed O.S. No. 26 of 1956 in the Sub-Court, Tirunelveli, which was later transferred to the District Court and registered as O.S. No. 3 of 1960 for the following relief:

"It is therefore prayed that this Court be pleased (*a*) to take over possession of the Schedule properties from the plaintiff and direct payment of the Court-fee and other cost incurred by the plaintiff in the first instance, (*b*) to adjudicate the claims of the defendants in respect of the suit and to pass a decree for possession accordingly, and (*c*) to grant such other and further relief as may seem fit and proper to this Court".

The suit is purported to be filed under section 28, Civil Procedure Code, as an inter-pleader suit, and a Court-fee of Rs. 200 was paid under section 50 of the Madras Court-fees Act (XIV of 1955). On a Check-slip issued by the Court-fee Examiner, the learned District Judge held that the nine sharers should equally contribute to the total Court-fee of Rs. 6,000 payable on the plaint. This the learned

* C.R.P. Nos. 1055, 1079 and 1545 of 1960. 1st December, 1960. (10th Agrahayana, 1882-Saka.)

District Judge did, under section 48 of the Court-fees Act. Section 48 (2) states that, where issues are framed between the claimants, the total fee payable on the basis of the market value of the property which formed the subject-matter of the suit would be ascertained, and, after giving due credit for the initial payment made, the balance shall be divided in equal shares between the claimants who claim the property adversely to each of them. The nine sharers do not claim equal shares in the property. Some of them claim a 15th share, and some others, a larger share. But the learned District Judge has apportioned the Court-fee payable equally amongst them. It is this order that is sought to be revised in these petitions.

It will be apparent from a reading of the plaint that the suit, though styled as an inter-pleader suit, is not, in substance one. The prayer which I have extracted above shows that the Court has to take charge of the property and ascertain the shares and distribute the same in accordance with the shares of various claimants. That would be an administration suit, and not a mere inter-pleader suit. Mr. Ramajujam, who appears for the Government Pleader, has nothing to say against this view. If so much is conceded, namely, that the suit is an administration suit, the proper section of the Court-fees Act to apply will be section 39. The stage at which Court-fee has got to be levied will be after the shares are ascertained and before the decree is passed. That stage has not yet been reached. Under the circumstances, the order of the lower Court calling upon the various claimants to pay the Court-fee now on the footing that the suit was an inter-pleader suit, cannot be sustained, and it is set aside. In this view, it is unnecessary to determine whether or not the value adopted by the lower Court in assessing the Court-fee or in apportioning the same equally is right.

There wil be no order as to costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Apparswami Chettiar .. *Petitioner**

v.

Sri Parvathavardham Sametha Ramanatheeswara Choudambigai Amman Temple, Cuddalore, by its Managing Trustee K. V. Subramania Chettiar .. *Respondent.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *section* 8—*Claim for payment of costs of improvement as a condition of surrendering possession—If a counter-claim.*

A claim by a defendant in a suit for possession of property, that he should be paid the cost of improvements effected by him as a condition of the decree for possession, is neither a claim for set-off nor one by way of counter-claim and section 8 of the Madras Court-fees and Suits Valuation Act cannot apply to such claims.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Principal District Munsif, Cuddalore, dated 14th August, 1959 and made in O.S. No. 297 of 1958.

P. V. Subramanyam, for Petitioner.

K. Raman, for Respondent and *G. Ramanujam* for the Government Pleader (*A. Alagiriswami*), for the State.

The Court made the following

ORDER.—This is a revision petition at the instance of the defendant in O.S. No. 297 of 1958 against an order directing payment of Court-fee in regard to a claim for improvements made in the following circumstances. The respondent filed a suit for a declaration of its title to the suit property, for possession and recovery of mesne profits. The petitioner, in addition to contesting the title of the respondent,

* C.R.P. No. 1404 of 1959. 28th November, 1960. (7th Agrahayana, 1882-Saka).

pleaded that he had effected improvements to the property to an extent of Rs. 1,500 and before a decree for possession could be passed, he should be compensated to the extent of that amount. The lower Court has held that the petitioner should pay Court-fee on that amount. It is plain that the claim of the defendant to be paid the cost of the improvement as a condition of the decree for possession is neither a claim for set-off nor one by way of counter-claim. Mr. Ramanujam, who appeared for the Government Pleader, sought to contend that the claim would come within the term ' counter claim ' in section 8 of the Court-fees Act. Reliance was placed on the decision in *Alamelu Ammal* v. *Thayarammal*[1]. That was a case where a mortgagor filed a suit for redemption. The defendant to the suit, namely, the mortgagee, contended that, in addition to the mortgage money, the plaintiff should pay the costs of improvements effected by him. Jagadisan, J., held that the claim for improvements was a counter-claim and therefore Court-fee should be paid on such a claim. I am however unable to see how the principle of that decision can apply to the present case. In my opinion, the claim of the petitioner cannot be said to be either one by way of set-off or by way of counter-claim. For example, it cannot be said that even if the cost of improvements is allowed to the petitioner, he would be entitled to set it off against the decree for possession that may be passed in favour of the respondent. Nor can it be said that it is a counter-claim for the simple reason that no decree could be passed in favour of the defendant who claims compensation for improvements. The only decree that will be passed in the suit if the plaintiff succeeds in his claim and the defendant also succeeds in his case as to improvements, will be a conditional one, *viz.*, that the plaintiff will be entitled to delivery of possession on payment of the amount adjudged to the defendant. The defendant cannot execute that decree and obtain payment of the amount adjudged as and for improvements. If the plaintiff does not choose to execute the decree the defendant would have no right at all to recover what he spent for improvements by executing the decree. It is therefore clear that section 8 will not apply to the claim for improvements made by the petitioner. The order of the lower Court is therefore set aside. There will be no order as to costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

G. Manavala Naidu, Madras .. *Applicant**

v.

The Commissioner of Income-tax and Excess Profits Tax, Madras.. *Respondent.*

Income-tax Act (XI of 1922), section 10—Assessee contracting with military authorities to make garments out of material supplied—Loss of number of garments in course of years ascertained in relevant year of account—Whole claim if allowable in that year.

Material for making garments had been supplied by the military authorities to the assessee at a price fixed by them which was higher than the ordinary market value. There was a short delivery of garments ascertained in the year of account and in reference to that year the assessee claimed the whole of that loss.

Held :—The fact that some of the garments might have been lost in the previous years, and even the fact that the assessee admitted that possibly only about one half of the claim represented the value of the garments lost in the relevant year of account made no difference to the claim of the assessee. Even if the loss had been spread over a number of years, till the loss was ascertained, there could be no possibility of his showing them in his accounts (maintained on a mercantile basis). Once the loss was established, the whole of the claim had to be allowed.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, ' B ' under section 66 (2) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R.A. Nos. 213 and 214 of 1952-53 (I.T.A. Nos. 7632 and 7633 of 1950-51

1. (1960) 73 L.W. 665.

* Referred case No. 55 of 1955.

23rd February, 1960.
(4th Phalguna, 1881—Saka).

Assessment years 1943-44 and 1944-45 respectively and R.A. Nos. 215 and 216 of 1952-53 (E.P.T.A. Nos. 740 and 741 of 1950-51 respectively—Chargeable Accounting periods 1st April, 1942 to 31st March, 1943 and 1st April, 1943 to 31st March, 1944 respectively) on its file for decision on the following questions of law, *viz* :

C.M.P. Nos. 10652 *and* 10654 *of* 1953:

"Whether on the facts and in the circumstances of the case the disallowance of the sum of Rs. 7,923 out of the total claim of Rs. 15,845 was justified in law ?"

C.M.P. Nos. 10653 *and* 10655 *of* 1953:

"Whether on the facts and in the circumstances of the case the disallowance of the sum of Rs. 6,186 out of the total claim of Rs. 16,186 was justified in law ?"

K. Srinivasan, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax assisted by *S. Ranganathan*, for the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The first question relates to the assessment year 1943-44, the previous year for which ended on 31st March, 1943. The second question relates to the year of account ending with 31st March, 1944, the corresponding assessment year being 1944-45.

On the findings of the Tribunal, we can see no justification for the disallowance ordered by the Tribunal. The Income-tax Officer disallowed the claim as a whole in each year on the ground, that no shortage had been proved. The Assistant Commissioner allowed the claim as a whole in both the years, because he was satisfied that the assessee sustained loss by the shortgage in garments. The position taken by both, whichever view was right, was at least logical. The Tribunal took something like an intermediate position, and, as we pointed out earlier, there seems to be no logical basis for disallowing any portion of the claim.

With reference to the assessment year 1943-44 the Tribunal pointed out that even the assessee admitted that the loss in garments for which a claim was made was sustained not only in the year ending with 31st March, 1943, but also in the previous years. But the Tribunal apparently also found that it was only in that year that there was a demand made by the military authorities to make good the value of the garments short delivered, that is garments lost by the assessee. The assessee maintained his accounts on a mercantile basis. Even if the loss had been spread over a number of years, till the loss was ascertained, there could be no possibility of his showing them in his accounts. The Tribunal apparently accepted the case of the assessee, that it was only when the military authorities demanded the recovery of Rs. 15,845 in the year of account ending with 31st March, 1943, that the loss was ascertained. Thus with reference to that year the position was that, though when precisely each garment or each set of garments was lost could not be fixed with precision, the loss was ascertained only in the year of account, and it was only in the year of account that the assessee had to make good the value of the lost garments to the military authorities. It should be remembered that the material for making garments had been supplied by the military authorities at a price fixed by them, a price which was higher than the ordinary market value. The Department accepted the contention of the assessee, that the assessee could not trade in those garments. Therefore, if there was a short delivery to the military authorities, that was virtual proof that as far as the assessee was concerned, these pieces themselves were lost. Hence the caption "lost garments", under which the claim for loss sustained in the course of the business was made.

With reference to the assessment year 1943-44, the fact that some of the garments might have been lost in the previous years, and even the fact that assessee admitted that possibly only about one half of the claim represented the value of the garments lost in the relevant year of account made no difference to the claim of the assessee. The loss was ascertained in that year, and it was only with reference

to that year that he could claim that loss. Once the loss was established, the whole of the claim had to be allowed. That was the view taken by the Assistant Commissioner, and, in our opinion, he was right.

With reference to the second year of account, on the findings of the Tribunal, there seems to be no justification for any deduction from the claim made by the assessee. The Tribunal did not find for instance that the assessee had been paid in full by the military authorities. Nor did the Tribunal find that the assessee had not established the loss he claimed. If those two factors were beyond dispute, then the fact that in the case of others a claim had been allowed on the basis of a percentage of 1.75 was really irrelevant. On the material placed before the Tribunal, the Tribunal should have allowed the whole claim ; that is, as we said, on the finding recorded by the Tribunal, there was no justification for reducing the claim made by the assessee.

We answer each of the questions in the negative and in favour of the assessee. In our opinion, the entire claim ought to have been allowed in each of the years.

The assessee will get the costs of the reference. Counsel's fee Rs. 250.

K.S. *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Veeraiyya Kalingarayar .. *Appellant**

v.

The Trichy District Board represented by its President and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 85 and Civil Rules of Practice, Rule 158—Return of the receipt into Court by auction-purchaser—Necessity for due compliance—Application for review before re-sale by purchaser who failed to return the receipt—Duty of Court—Appeal against order refusing to review—Competency.

For a due compliance with the provisions of Order 21, rule 85, Civil Procedure Code, the auction-purchaser should return to the Court the receipt for the remittance in accordance with Rule 158 of the Civil Rules of Practice.

Where the auction-purchaser fails to comply with Rule 158 and after the Court had fixed a day for the re-sale of the property and before the sale, applies to the Court under section 47 and Order 47, rule 1, Civil Procedure Code, for a review of the order for re-sale, and producing the receipt into Court, it was the plain duty of the Court to relieve the party against injustice on subjecting him to certain reasonable terms.

An appeal against the order refusing the application for review was competent since the application was one under section 47, Civil Procedure Code, as well and on the date of the application for review the re-sale had not taken place and the auction purchaser who represented the interest of the judgment-debtor could properly maintain the application as the matter would be connected with the question of the discharge of the decree.

Appeal against the order of the District Court of West Thanjavur at Thanjavur dated 3rd September, 1958 and passed in A.S. No. 64 of 1958 preferred against the order of the Court of the Subordinate Judge of Thanjavur, dated 2nd December, 1957 and made in F.A. No. 554 of 1957 in O.S. No. 214 of 1952 on the file of the Court of the District Munsif of Tiruchirapalli.

R. Sundaralingam, for Appellant.

B. V. Viswanatha Ayyar, for Respondents.

The Court delivered the following

JUDGMENT :—This is a rather extraordinary case. On 2nd September, 1957, there was a sale in execution of the decree in O.S. No. 214 of 1952 on the file of the District Munsif's Court, Tiruchirappalli. The auction-purchaser, who is the appellant in this appeal deposited 25 per cent of the price. Within the time limited by law and the conditions of the sale proclamation, he deposited the balance of 75 per cent in the treasury. This was on 14th September, 1957. But unfortunately the purchaser, who did not engage or was advised by a legal practitioner and who,

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* A.A.A.O. No. 9 of 1959. 16th August, 1960.
(25th Sravana, 1882—Saka).

I am told, was illiterate as well, did not know the rules of Court under which the receipt issued by the treasury should have to be lodged in Court. Rule 158 of the Civil Rules of Practice provides for the payment of the purchase price into the bank or treasury, the receipt from which should be deposited in Court. The appellant appears to have thought that the receipt was intended for his own purposes. He did not put it into Court. On 14th October, 1957, the Court, not having been apprised of the fact that the purchaser had performed his obligations in its entirety, directed a re-sale of the property. By that order the executing Court fixed the re-sale for 16th December, 1957. The appellant, coming to know that the property was to be sold afresh, rushed up to the Court. On 18th November, 1957, he filed an application to the executing Court under Order 47, rule 1, Civil Procedure Code, praying that the Court might review the order for sale passed on 14th October, 1957, and filing the treasury receipt into Court. Although the sale was yet to take place, the learned Subordinate Judge of Thanjavur strangely enough dismissed the application. It must be noticed that the appellant had deposited the money in time. There was no doubt an irregularity committed by him in that he had not filed the treasury receipt in Court in time. When the appellant apprised the Court that he had really paid the amount of the purchase money, it was the plain duty of the executing Court to rectify its own mistake and recall the order for sale. But that is not what the executing Court did. It allowed the sale to proceed. The decree-holder himself purchased the property. Disappointed with the order of the executing Court, the appellant filed an appeal to the District Judge at Tanjore. The learned District Judge upheld the order of the executing Court. He held that for a due compliance of the provisions of Order 21, rule 85, Civil Procedure Code, the production of the chalan in accordance with rule 158 of the Civil Rules of Practice was necessary. That may be so. The learned District Judge failed to note that it was the duty of the executing Court on being informed that the entire price had been paid in time to rectify the mistake and relieve the party against injustice subject to such terms as it might deem fit to impose in the circumstances of the case. The learned District Judge further held that as the executing Court had refused to grant a review of its order for re-sale no appeal could be entertained by it. In this the learned District Judge was in error. The application for review of the order was filed under section 47, Civil Procedure Code, as well. As at the time the application was filed the re-sale had not taken place, the auction-purchaser who represented the interest of the judgment-debtor could properly maintain the application, as the matter would be intimately connected with the question of discharge of the decree. The learned District Judge has pointed out that no interference with the order of re-sale was possible as the property had actually been resold. The learned Judge failed to notice that in the re-sale it was only the decree-holder that purchased the property, and if the Court sets aside the order as it should have done in the circumstances restitution by delivering back the property to the appellant would be possible. I am therefore of opinion that the lower Court should not have directed the re-sale as if the appellant was in default in the payment of the balance of the purchase money, but instead should have granted the application out of which this appeal arises, subject to such objections as the decree-holder may like to urge.

Mr. Viswanatha Iyer, learned counsel for the respondent, brought to my notice that no notice of the review petition was given by the executing Court to the decree-holder and that therefore no final order should be passed without giving him an opportunity for showing cause against the granting of the review. Such opportunity should be deemed to have been given when notice of the appeal in the District Court and of this Court went to him. The decree-holder has also been heard.

I therefore set aside the orders of the lower Courts and direct the petition to be restored to file in the Sub-Court of Tanjore and disposed of after notice to the decree-holder, auction-purchaser, on the question of the disposal of the sale proceeds of the 1st sale and for giving directions for delivery of property to the appellant. There will be no order as to costs.

V.S. ——— *Appeal allowed. Petition restored.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Messrs. C. S. Y. Appavoo Pillai & Sons, Tiruchirappalli .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (*XI of* 1922), *section* 25 (4)—*Undertaking and executing contracts by the family—If business—Assessment to tax under the* 1918 *Act—Succession to the business—Relief under section* 25 (4)—*Right to.*

The work of undertaking and executing contracts constitutes a well recognized business and profits therefrom are assessable as income from business. Where such business carried on by the family assessed as an association of persons is taken over by a partnership there was a complete succession to that business in contracts. The business that had belonged to the family, thereafter belonged to the partnership though the identity of the persons was the same. The family had been assessed to tax under the 1918 Act on its share income from the business of the Contracts. There was also a continuity of the business. The assessee has to establish only continuity of the business and not also continuity of assessment.

The assessee was entitled to relief under section 25 (4) of the Income-tax Act.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (2) of the Indian Income-tax Act, 1922 (XI of 1922) in R.A. No. 601 of 1951-52) on its file (I.T.A. No. 4303 of 1948-49 Assessment year 1943-44) for decision on the following question of law, *viz* :

"Whether on the facts and circumstances of the case, the assessee was entitled to relief under section 25 (4) of the Act in respect of his contract business?"

S. Swaminathan, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax and *S. Ranganathan,* for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—Gnanadhikam, and his brothers, Innasimuthu and Sandanaswami, carried on business under the trade name C.S.Y. Appavoo Pillai and Sons. After Gnanadhikam's death, his son Lourdasami took his place. It should be convenient to refer to this group as the Family in the rest of this judgment. This Family was all along assessed to income-tax in the status of an association of persons.

One of the lines of business of the Family was timber, and it was common ground that on the profits of that business the Family was assessed to income-tax under the 1918 Act. In 1920, Gnanadhikam, on behalf of the family, entered into a partnership with Arunachalam to carry on the business of contracts, mainly contracts with the South Indian Railway Company obtained in the name of Arunachalam. The Family was to finance the business, and in addition to the interest on the sums advanced to the partnership, the Family was entitled to a third share of the profits. On the share income of these profits also the Family was assessed to tax as an association of persons under the 1918 Act. Arunachalam died on 5th January, 1927. Gananadhikam continued the business in contracts on behalf of the Family. Arunachalam's widow and his legal representatives relinquished all their rights in the business by a deed dated 2nd December, 1927, Annexure D. The Family continued the bussiness in contracts also in addition to its business in timber. As we said, the family was assessed all along in the status of an association of persons.

On 31st December, 1942, there was a family arrangement between the three members of the Family, Lourdaswami, Innasimuthu and Sandanaswami. Lourdasami's sister was also a party to that transaction. That does not affect any of the questions at issue now. The Family business in timber was closed down, and thereafter Innasimuthu and Sandanasami each carried on business in timber for himself. The family arrangement evidenced by Annexure A also provided for the

*Case Referred No. 14 of 1955.

22nd February, 1960.
(3rd Phalguna, 1881—Saka).

continuance of the business in timber that Lourdasami had been conducting on his own. Thus the business in timber as a Family business ceased on 31st December, 1942. The contract business however was continued, and the provision in the document was that it should be conducted by the three members of the Family, Lourdasami, Innasimuthu and Sandanasami, as constituting a partnership. This partnership took over the contracts that had been obtained by the Family in the name of Lourdasami. Paragraph 6 of Annexure A provided :

" Further, business are being carried on at present in the name of A. S.G. Lourdasami Pillai, in Railway, Government and other contracts, gravel and jelly contracts, etc. In respect thereof, a deed of partnership has been drawn up, between the parties of the first, third and fourth parts herein. The said parties shall share the net profits or losses arising therefrom in equal portions, in accordance with the terms and conditions of the said deed of partnership. "

Paragraph 8 of Annexure A provided that Sandanasami should be entitled to the benefits of the contracts that stood in his name. Apparently those contracts were not treated as coming within the scope of the business the Family conducted, for which provision was already made in paragraph 6.

In the assessment year 1943-44 the assessee Family claimed with reference to the period of accounting from 13th April, 1942 to 31st December, 1942, relief under sub-sections (3) and (4) of section 25 of the Income-tax Act, with reference to both the lines of business, timber and contracts. Relief was granted under section 25 (3) with reference to the business in timber, and that is no longer in issue. The Department however held that the Family, the assessee, was not entitled to relief either under section 25(3) or under section 25(4) with reference to the business in contracts.

The Tribunal agreed with that view. The question referred to this Court under section 66(2) of the Income-tax Act was :

" Whether on the facts and circumstances of the case the assessee was entitled to relief under section 25 (4) of the Act in respect of his contract business ? "

A fuller investigation than that undertaken by the Tribunal at the stage of the appeal was ordered by this Court when it directed the Reference under section 66(2) of the Act. The Statement of the case drawn up in compliance with those directions had therefore necessarily to travel to some extent beyond the Tribunal's order on appeal, and some of the original findings were revised when the Statement of the case was submitted.

The learned counsel for the Department urged that though the Statement of the case complied with the directions given by this Court, the Court at this stage should only proceed on the basis of the findings recorded in the order on appeal out of which arose the question of law that has to be determined by this Court. This contention of the learned counsel for the Department need not be discussed as an abstract proposition of law in the circumstances of this case. Whether the findings, either those recorded in the order on appeal or those recorded in the Statement of the case, were supported by the material on record is still a matter for investigation by Court at this stage.

One of the grounds on which the Department and the Tribunal held that section 25 (4) could not apply was that contracts could not constitute a business. The learned counsel for the Department did not seek to support the correctness of that finding. It should be needless to cite authorities for the position, that undertaking and executing contracts does constitute a well recognised business, and that profits therefrom are assessable as income from business. It is a little startling to be told by the Tribunal at this stage that because contracts are necessarily sporadic, they cannot constitute a business. Certainly it is impossible to accept the position that while contracts constitute a business for purposes of taxing the profits therefrom, they cannot constitute a business for the application of section 25 of the Act. We shall therefore proceed on the basis that contracts constituted one of the lines of business of the Family.

That there was a succession to that business in contracts at the end of 1942 could admit of no doubt. The business that had belonged to the Family thereafter belonged to the partnership, though no doubt the identity of the persons that

constituted the Family and the partnership was the same. The Tribunal upheld the view taken by the Department, that though there was a succession, it was not a succession to the entire business. The Tribunal pointed out that some of the contracts were taken over by Sandanasami independent of the partnership. We have set out the terms of paragraph 6 of the Annexure A and we have also referred to paragraph 8 thereof. On a proper construction of clauses 6 and 8 of Annexure A, which evidence the family settlement, it seems clear to us that the reservation in clause 8 was with reference to contracts which never came within the scope of clause 6, and only contracts that came within the scope of clause 6, that is, contracts obtained in the name of Lourdusami constituted the business of the Family; that factually the partnership took over the entire business in contracts that the Family had been conducting before that as constituting an association of persons. The learned counsel for the assessee referred to the decision in *Kaniram Ganpatrai* v. *Commissioner of Income-tax*[1], in support of his contention, that even if the partnership had only succeeded to the bulk of the business of the Family, that would have satisfied the requirements of section 25 (4) of the Act. The contention is no doubt well founded, but it is needless to pursue that line of argument, because factually the contracts that stood in the name of Sandanasami did not form part of the business the Family carried on. As far as the Family was concerned succession was complete, and the Family as such effaced itself after the transaction of 31st December, 1942. The business in contracts which the Family had been conducting before that stood transferred to the partnership after 31st December, 1942.

We have already pointed out that the Family commenced its business in contracts in 1920. At that stage that business was conducted by the Family in partnership with Arunachalam. Arunachalam's death in 1927 dissolved that partnership. But it did not break the continuity of the business that the Family carried on. Annexure D, under which the legal representatives of Arunachalam relinquished all their rights, made it clear that there was no break in the continuity of the business which commenced in 1920 under the deed of partnership executed by Gnanadhikam and Arunachalam. The Tribunal was of the view that the business commenced in partnership with Arunachalam in 1920 must have come to an end some time before 1924, and that the business for the continuance of which the transaction of 1927 provided must have been a new one. It is true that the Family was not assessed to tax on any share income from the business in contracts in the assessment year 1924-25. What the assessee had to establish was only continuity of business and not also continuity of assessment. Apart from that factor there was really no basis at all for the conclusion reached by the Tribunal, that there must have been a discontinuance of the partnership business some time before 1924, and that a new partnership business must have come into existence some time thereafter. There was only one deed of partnership, the one executed in 1920. Annexure D specifically referred to the partnership constituted under that document, and it was the rights of Arunachalam's heirs in that partnership that were given up by them. All the evidence points one way, that till Arunachalam's death there was no break in the business in contracts, the business which the Family conducted in partnerships with Arunachalam. On Arunachalam's death, the Family succeeded to the whole of that business by arrangement with the legal representatives of Arunachalam. That that business was continued by the Family without any break after 1927 was never in issue. The finding of the Tribunal, that there was a break in the continuity of business some time before 1924, has thus to be left out of consideration. It was not supported by any material on record.

Though at the stage of the proceedings before the Departmetal Officers they were not satisfied that the Family had been assessed to tax on the income from the business in contracts under the 1918 Act, that is, in the assessment years that preceded 1922, that point was cleared up, and the finding now is that the records of the Department themselves proved that the Family had been assessed to tax under the 1918 Act on its share income from the business in contracts. We have already pointed out

1. (1953) 23 I.T.R. 314.

that there was no break in the continuity of that business from 1920 to 1942 That there was a succession to the business commenced in 1920, in 1927 after Arunachalam's death in no way affected the real question at issue, whether the Family was entitled to relief under section 25 (4) of the Act on the basis of the succession in 1942 The view taken by the Tribunal that section 25 (4) contemplates only one succession and would not apply to cases where there had been an earlier succession before 1939 is erroneous and we did not understand the learned counsel for the Department to support that view.

The assessee satisfied all the requirements of section 25 (4) and was therefore entitled to the relief the assessee claimed under section 25 (4) of the Act. We answer the question in the affirmative and in favour of the assessee. The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

V.S. *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Abdur Rahim .. *Petitioner**

v.

State of Madras, represented by the Secy., Dept. of Industries, Labour and Co-operation, Fort St. George, Madras.. *Respondent.*

Madras Beedi Industrial Premises (Regulation of Conditions of Work) Act (XXXII of 1958)—Validity—If opposed to Article 19 (1) (g) of the Constitution.

The Madras Beedi Industrial Premises (Regulation of Conditions of Work) Act, except section 2 (*g*) (i) of the same, is a valid piece of legislation and the provisions of the Act do not generally offend against Article 19 (1) (*g*) of the Constitution. There is no prohibition in the Act of the business of manufacture and sale of beedies though there is a restriction or regulation in regard to the mode of manufacture. The restrictions imposed under the Act are reasonable and in the interests of the public and saved by Article 19 (6) of the Constitution. Section 2 (*g*) (i) of the Act however, which makes a trade mark holder or registered user liable under the Act is unreasonable and unrelated to the mischief sought to be remedied and is as such void and unenforceable.

(Case-law discussed—Policy behind the Legislation considered—Provisions of the Act analysed—Object and scope of the provisions indicated.)

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith and the further affidavit filed therein the High Court will be pleased to issue a writ of *mandamus* directing the respondent to forbear from enforcing the provisions of the Madras Act No. XXXII of 1958, called the Madras Beedi Industrial Premises (Regulation of Conditions of Work) Act, 1958, particularly sections 3,4,17 and 29 for preventing the petitioner from running his branch business and carrying out his trade according to the custom and usage of the trade on the ground that the said provisions of the Act are *ultra vires* of the Constitution.

K.V. Venkatasubramania Ayyar, Inamdar Abdus Salam, Samiullah Baig, C.L. Narain, K.K. Venugopal, M.K. Nambiyar, for Petitioner.

The Advocate-General (*V.K. Thiruvenkatachari*) and the Additional Government Pleader (*M.M. Ismail*), for Respondents.

The Order of the Court was made by

Ramachandra Iyer,—These twenty-eight petitions are filed under Article 226 of the Constitution, and raise the questions as to the constitutional validity of the Madras Beedi Industrial Premises (Regulation of Conditions of Work) Act, 1958 (Act XXXII of 1958), which hereafter shall be referred to as the Act.

The Act was passed by the Madras State Legislature to regulate the conditions of work in beedi industrial premises in the State of Madras, so as to enable the enforcement of labour and welfare laws. The Act authorises the making of rules to

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*W.P. Nos. 592, 1028, 1112 to 1116 and others of 1959. 21st January, 1960.

carry out the purposes of the legislation. In exercise of such powers, the Government have made rules. The Act received the assent of the President on 3rd December, 1958. It extends to the whole of the Madras State, and is to come into force on such date as may, by notification, be appointed by the Government which is authorised in its discretion to fix different dates for different areas and for the coming into force of the whole or different provisions of the Act. By Government Order Miscellaneous No. 1376, Industries, Labour and Co-operation, dated 26th March, 1959, the Government notified that the first of July 1959, would be the date on which all the provisions of the Act, except sections 10 and 12 to 16 would come into force and that was to be throughout the State of Madras. Sections 10 and 12 to 16 were first notified to come into force on 1st January 1960. By the said Government Order it was also notified that the Governor of Madras specified that 1st September, 1959, as the date on and after which no place or premises shall, save as otherwise provided in the said Act, be used as beedi industrial premises without a licence being obtained from the competent authority and except in accordance with the terms and conditions specified in such licence. That date has since been altered by substituting 1st of July, 1960, as the date on or after which the licensing provisions of the Act are to come into force regarding the use of premises as beedi industrial premises, as defined by the Act. It cannot be and it is not disputed that the State Legislature is fully competent to legislate in regard to the subject-matter of the Act, as it would come within Items 24 and 26 of List II, namely, *industries,* and *trade and commerce within State* and Items 7 and 22 to 25 in List III, namely, *contracts, etc., trade union, industrial and labour dispute, social security* and *social insurance, employment* and *unemployment* and *welfare of labour, etc.,* of the Seventh Schedule to the Constitution.

The provisions of the Act are, however, impugned, as in effect contravening the fundamental rights guaranteed under Article 19 (1) (*g*) of the Constitution.

The petitioners in the above petitions can be broadly classified into four groups : (i) the proprietor of a beedi factory, (ii) the owner of a trade mark registered under the Trade Marks Act, 1940, in relation to beedies, (iii) the branch managers of middle men who claim as independent contractors and (iv) part-time outworkers.

The petitioner in Writ Petition No. 1028 of 1959, is the proprietor of a factory in Madras and also the owner of a registed trade mark, *Taj Mahal Beedies,* with a right to use the trade mark in relation to beedies of their manufacture for business within the State of Madras and in certain districts in Andhra Pradesh. The petitioner claims that their business was established nearly sixty years ago, and that they have been doing the business, in accordance with the well established usage of the beedi industry by selling the beedies manufactured in their own factory, as well as those obtained through independent contractors or on job work contract basis with outworkers in their own homes. In respect of the latter category, the work in the petitioner's factory consisted merely in supplying at a price tobacco, beedi leaves, etc., to the contractors or outworkers, obtaining by a system of purchasing beedies manufactured by them from out of the material supplied to them which thereafter undergo a process of heating in the factory, then labelled, packed and despatched. It is claimed that the turnover of the petitioner's business for the year 1958-59, was rupees forty-seven lakhs. The petitioner impugns the Act on the ground that it places a restriction in obliging him to take out a licence, and that it has rendered the business through contractors and outworkers impossibe.

In Writ Petition No. 1141 of 1959, the petitioner firm is the proprietor of two trade marks *No. 25 Double Peacock,* and *No. 99 Beedies.* The firm carries on its business in the sale of beedies manufactued under what is known as contract system, its premises being utilised only for the purpose of packing and labelling beedies purchased from the contractors. The system adopted in obtaining beedies from outside is as practically the same as in the previous case. The petitioner complains that the Act has interfered with the manner in which the firm had been conducting business in selling beedies, using their registered trade marks, and that, in order to continue their business, they would have to establish a factory or be vicariously liable for the contractors' factory.

The petitioner in Writ Petition No. 592 of 1959, claims, to be the branch manager for the manufacture of beedies sold under the trade mark of *Diamond Beedies*. He claims that about eighty-two persons, mostly women, are working in his branch. The affidavit filed by the petitioner was not very clear as to the precise interest he had in the concern which sells beedies using the trade mark, *Diamond Beedies*. An application to implead the firm selling *Diamond Beedies* as a party to the petition failed, as the proprietor of that business was not willing to come on record. The petitioner was, therefore, directed to appear before us to give evidence regarding his status in that concern and the interest which he possessed to sustain the present application. In the evidence, the petitioner admitted that he was only a contractor who took tobacco from the proprietor of the *Diamond Beedi* trade mark, employed labourers for rolling beedies and supplying the same to the *Diamond Beedi* factory at a price. The petitioner's case is that the enforcement of the provisions of the Act would result in the annihilation of his business as a contractor.

The petitioner in Writ Petition No. 1149 of 1959, is an employee of the Buckingham and Carnatic Mills, Madras. He states that his work in the mills would be over by 3-15 P.M. each day, and that during the spare hours, he engages himself in the subsidiary occupation of rolling beedies by obtaining tobacco and beedi leaves from the contractor of *Latif Beedi Factory* at Madras. He further states that his wife and his minor daughter, the latter being aged about fourteen years, help him in cutting the beedi leaves to the requisite size and in rolling the beedies. He complains that, if the factory system envisaged by the Act is introduced for the manufacture of beedies, he would be denied the subsidiary occupation which enables him to earn a few rupees, and that his wife and child who were *gosha* ladies would also be denied the opportunity of earning something.

Before considering the case of the petitioners, it is necessary to briefly refer to the process adopted in the manufacture of beedies and the organization of the industry in this part of the country. The manufacture of a beedi is done in stages. The tobacco employed for beedies is blended very often with some other ingredient. A small quantity of it is put on a beedi leaf which is previously wet to render it flexible and cut to size. The beedi leaf is then rolled keeping the tobacco within it and its ends are then closed, sometimes at the fire end alone and in other cases at both ends. The beedies thus rolled are collected and warmed or roasted, after which they are ready for packing, labelling and sale. In a case where the ultimate proprietor owns the trade mark, the trade mark labels are affixed to the individual beedies as also on the packets containing them. It will be thus noticed that the work of wetting and cutting of the wrapper leaves is one of the items of work in the process.

It is not and indeed cannot be disputed that making of beedies will be a manufacturing process. Power is seldom employed for the purpose, the industry depending entirely upon human labour. Therefore, if more than twenty workers are employed in a particular place for the manufacture of beedies, the provisions of the Factories Act, 1948, would apply to the premises, and the employer would be liable for the obligations cast on him by that enactment.

Three systems are adopted in the manufacture of beedies. In certain cases, more than one of them is adopted by the same proprietor. (i) Where the manufacturer is the owner of a factory, workers gather and work under his supervision as his employees. (ii) The contract system of employment (which is most prevalent), under which the proprietor gives to middle men, called branch managers or contractors, quantities of beedi leaves, tobacco and packing materials, etc. For the articles thus supplied, the proprietor fixes his own price, very often at a rate higher than the market rate, so that there would not be any temptation for the contractor to divert the tobacco or other articles thus supplied to other traders. The price is debited in the accounts against the contractor, but is seldom paid in cash. It is adjusted against the amounts due to be paid to the contractor on delivering the finished beedies, that transaction also taking the form of sale and purchase. What in effect the con-

tractor is paid is the difference between the cost price of materials delivered to him and the sale price of beedies given by him to the proprietor. It is a somewhat curious feature of the trade that even the sale price is not fixed by contract or according to the market rate, but by the proprietor who evidently fixes the same so that it may offset the inflated price of the materials supplied by him and allow a margin as remuneration or profit for the contractor. The contractor, on receiving the materials manufactures beedies (i) by employing directly labourers and manufacturing beedies or (ii) by distributing the materials amongst the home workers, as they are called, mostly women who manufacture beedies in their own homes with the assistance of other members of their family, including children. An outworker is paid on a piece rate.

A third system is also prevalent; the proprietor himself without the agency of middle men, supplies the tobacco and beedi leaves to the various outworkers who roll beedies, and are paid at a particular rate. The beedies thus supplied, whether by the outworkers or contractors, are roasted, labelled and packed by the proprietor and sold to the public. So much has been established by the admitted facts and previous judgments of this Court of which judicial notice could be taken, and there is no dispute in regard to the same.

With a view evidently to escape responsibility under the provisions of the Factories Act and other labour laws, a large number of proprietors adopt only the contract system. The contractor, in case he engages labourers directly, congregates less than the statutory number, that is, less than twenty in a particular place, so that the premises might not attract the application of the Factories Act. There are certain features of the prevailing system which are obvious (i) there is a fragmentation of the places of manufacture of beedies obviously with a view to evade the factory and similar legislation; (ii) there is no definite relationship of master and servant between the actual worker and ultimate proprietor; the so-called branch managers or contractors are very often men of straw; the ultimate employer, namely, the proprietor, will not be answerable for the wages of the outworkers, there being no privity of contract between them; (iii) a large body of actual workers are illiterate *purdah women* who could with impunity be exploited by the proprietors and contractors; more distressing than that is the indiscriminate and undetectable employment of child labour; (iv) the contractor being himself dependent on the proprietor has generally very little means to have any organized system. The system however, provides an occupation to women and infirm persons and also to workers employed elsewhere who in their spare hours, could earn something by themselves rolling beedies, which, it is said, requires very little muscular effort. But the very dependence of these people is its bane. They particularly, the *purdah ladies*, would have very little bargaining power against unscrupulous proprietors or contractors. The relationship between proprietor and the independent contractor (though it cannot be assumed to be so in all cases) is well brought out by the terms of an agreement between them, of which a copy is filed within the petitioner's affidavit in Writ Petition No. 1028 of 1959. That is said to be typical of contracts which a contractor enters into with the proprietor. The contractor agrees under the contract that he shall purchase tobacco specially and suitably blended by the company (the petitioner) and shall pay for it at the ruling rate, as fixed by the company, and that he shall supply the company with such quantity of beedies as would be fixed by the company from time to time. He also undertakes not to use any tobacco other than that supplied by the company. The company has the authority to send its representative whenever necessary to inspect the place or places of manufacture of beedies by the contractor or his men. The contractor also undertakes not to enter into any agreement of similar nature with any other concern to make beedies or sell or supply them, while the agreement subsists. The agreement expressly stipulates that he would be the sole employer answerable in regard to disputes by the workers. In the counter-affidavit filed by the Government in Writ Petition No. 592 of 1959, it is stated that in certain cases the branch manager expressly agreed to limit the number of persons whom he collects in the premises to less than twenty evidently with a view to avoid the premises falling with-

in the Factories Act. It is difficult to appreciate how in those cases it can be said that the proprietor has no control over the contractor ; but yet under the system, he would not be answerable to the workers for any of their claims. The relationship between the proprietor, middlemen and the outworkers has been the subject-matter of adjudication by this Court as well as by the Supreme Court . In *Ahmed Hussain & Sons* v. *United Beedi Workers' Union*[1], a question arose whether the workmen employed by an intermediary could be held to be employees of the proprietor so that dispute could be referred to and adjudicated under the Industrial Disputes Act. In that case a firm of beedi manufacturers entered into a contract with an intermediary under which they supplied him the necessary tobacco and beedi leaves for purposes of being rolled and delivered with a stipulation that the necessary labour should be employed by the intermediary in a licensed premises of his choice, and that he should obtain payment for the beedies supplied at a stipulated price less the cost of materials supplied ; the relationship between the firm and the intermediary was held not to be that of a master and servant, but that of an independent contractor, and that the dispute could not be adjudicated under the Industrial Disputes Act. A similar question came up before the Supreme Court. In *Shri Chintaman Rao and another* v. *The State of Madhya Pradesh*[2], the proprietor of a beedi factory was prosecuted under the Factories Act for non-compliance with its provisions. The proprietor pleaded that the workers were not under his employment, and that there was no contravention of the Factories Act, as the *sattadars* who were found in the factory were independent contractors and were not workers. Under the system of beedi manufacture adopted by the factory, the management issued tobacco and sometimes beedi leaves to the *sattadars* who manufactured beedies in their own factories or by an arrangement with third parties. The *sattadars* collected the beedies thus made and supplied to the factories for a consideration. It was held that the *sattadars* were independent contractors and not the agents of the proprietor.

It could not be said that the proprietor of a business did anything illegal in adopting a system of beedi manufacture, under which he did not become responsible to the actual workers. Therefore, the enforcement of factory and labour legislation could be rendered impossible by adopting the simple device of disintegrating what normally would be a factory, each of the disintegrated elements being entrusted to a contractor, so that no one of the units would be a factory. It cannot be said that such a system would ever be to the advantage of the workers, but would rather facilitate the exploitation of sweated labour.

In 1944, the Government of India appointed a committee under the chairmanship of Mr. D.V. Rege, I.C.S., to investigate the conditions of industrial labour. The Committee enquired into the conditions obtaining in the beedi, cigar and cigarette industries. Mr. Rege's report made reference to the widely prevalent contract system, whereby the factory owners engaged a large number of middle men, supplied them with raw materials and purchased finished products from them. The report referred to the fact that, although the Madras Government applied the Factories Act to beedi factories employing 20 or more persons, the measure proved unsuccessful as no prosecutions could be launched for the violation of the enactment as the branch men gave incorrect names and as working places were changed. It stated that, in view of the extremely large number of beedi making establishments employing small number of persons, it would be futile to apply the Factories Act, but that the remedy lay in encouraing the establishment of big factories and licensing the same. The report concluded :

" To conclude, matters requiring immediate attention in the beedi and cigar industries are the unhealthy working conditions, long hours of work, employment of women and children deduction from wages and the sub-contract system of organization. It is desirable to abolish the out-work system and to encourage establishment of big factories, in the beedi and cigar industries, if protective labour legislation is to be enforced with any degree of success. In view of the large number of women workers in the beedi industry, appointment of a women factory inspector in the important beedi making provinces is desirable."

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1. (1959) 1 M.L.J. 65.
2. (1958) S.C.R. 1340 : 1958 S.C.J. 753 : (1958) M.L.J. (Crl.) 569.

In 1946, the Government of Madras appointed a Court of Enquiry into labour conditions in beedi, cigar, snuff, tobacco-curing and tanning industries. The report of the Court of Enquiry gives valuable information in regard to the organisation of those industries in South India. It was found that approximately there were about ninety thousand workers dependent on the beedi industry in the Madras province, and of them about twenty-six thousand and five hundred were women. It is also stated that the employment of children in the industry was universal, and that two-fifths of the total workers would be children, for every three adults there being two children working. The Court of enquiry found that, except in regard Mukkudal area where home workers were predominant, beedi workers were full-time workers, beedi-making being their main and not a subsidiary occupation. The wage structure of the employees revealed that they were paid less than the fair wages. The report also mentions how the simple minded *purdah women* were cheated by their employers. In paragraph fifty-eight of the report, the working conditions of the workers is described thus :

" The occupation of beedi rolling is carried on in all sorts of places—in large workshops housed in pucca buildings, small workshops, in houses, verandas of houses, small dingy rooms without windows, in kachcha buildings under the shade of trees, banks of tanks and canals, in short, in all imaginable places according as the industry is concentrated or diffused. Wherever direct employment of labourers by big manufacturers is found, hundreds of workers are generally massed together in old ramshackle houses, with rickety staircases unwashed and sometime unplastered walls and mostly unpainted windows and doors. Of course a few exceptions to this general rule are found where the manufacturers have constructed new buildings in recent years ; but most of the bigger workshops are houses improvised in rough and ready fashion into factories. Housed in new or old buildings, the workers everywhere squat on the floor on tattered mats surrounded by trays containing tobacco and cut or uncut wrapper leaves ; the latter soaked in the previous night in water emits a peculiar odour while the tobacco exhales its characteritic smell. The mixing of these strong odours pervades the whole workshop. Men, children, heaps of waste remnants of wrapper leaves, leaf and tin trays stuffed with tobacco, or newly made beedis, dirty and torn mats here and there, aluminium, brass and glass tumblers as well as bottles with dregs of tea and several other odds and ends strewn all over present a queer picture of jumble and disarray. A few instances from the samples investigated of per capital floor space may be helpful in visualising the degree of congestion in them ; they are 4, 4.1, 4.3, 4.5, 4.9, 5 and 6 square feet. Very few of them have any latrine or urinal. Workers are expected to go outside the premises to answer calls of nature. Frequently workers pass urine in convenient nooks and corners of the buildings and premises, be they on the ground or the first floor. In the recently constructed buildings, urinal and lavatory arrangements have been made but nowhere they are adequate. In kachcha buildings, conditions are worse due to mud floor and thatched roofs. I also visited a number of houses of workers in several centres where beedis are made by home workers. It is a misnomer to describe these low roofed thatched sheds as houses ; not even nine feet high at the centre, they are only four or five feet at the sides. In one slum area in North Madras, small hovel, less than forty-eight square feet in area, are divided into two rooms serving as kitchen, sitting, living and sleeping rooms and also as work places. Their floors are at or below the level of the road outside. Eight hovels of this kind have one common latrine and one common tap. The inmates of these hovels number forty-two including eighteen children. In this particular case, all the workers are Muslims and the womenfolk observe *purdah*. If industrial home workers are to work under such conditions, it will be a merciful act to take them out and put them to work in well-kept and sanitary workshops satisfying all the requirements of factory legislation. In Madras City, Tiruchirappalli and a few other places, small groups of workers numbering three to six or seven were seen huddled together in kennel-like rooms with only one door two and a half feet by three and a half feet and a floor space of twenty or twenty-five square feet. These *holes* have no windows and workers keep the trays of tobacco leaves on their laps and ply their task. Floors in medium-sized workshops are generally cemented, stone or brick-laid ; a good number of them show structural uniformity, being four verandas enclosing an open square yard, These workshops have sufficient light and ventilation but are kept unkempt and unclean. On the whole, working conditions are extremely unsatisfactory from the stand-points of *per capita* floor space, sanitaton, ventilation and lighting. Spending the better part of their lives in such miserable environments, workers in general and children in particular present a haggard appearance with yellowish eyes and hollow cheeks. Drinking water is kept in buckets or pots in most of the medium and large workshops. In smaller ones, street tube well or water tap is the only source by which workers can quench their thirst and they generally prefer the near-by tea shop to either.

In July 1954, the Government of India, observing the tendency on the part of the employers in beedi industry to resort to devices to circumvent the operation of the Factories Act, suggested to the various State Governments to assess the situation in all its aspects and with a view to affording maximum legislative protection to the workers. The State Government appointed Sri M.A. Natarajan, the Regional Inspector of Factories, for this purpose. He submitted a report about the distressing

conditions of work in that industry. Although the number of workers engaged in the manufacture of beedies in the State exceeded one lakh, his report shows that only seventeen thousand and five hundred and forty-four were employed as such in the factories and that the contract and home work systems enriched the proprietor at the expense of the worker, and also deprived the latter of his bargaining power in regard to the conditions of labour.

It must be remembered that every beedi manufacturer who has a large business should have a factory where the beedies supplied by the contractors or outworkers could be warmed, labelled and packed. A minimum number of employees is always necessary for those purposes. How much of the seventeen thousand and five hundred and forty-four factory workers belonged to that category or were engaged in the primary purpose of rolling beedies is difficult to say. Nor is it possible to obtain from the report any data as to how many of the outworkers were genuine home workers, or how many comprised merely the groups of less than twenty in the units employed by the contractors. Perhaps in the very nature of the things existing, collection of such statistics was difficult. Mr. Natarajan generally says that a large army of women are employed in the industry. It is not known how many were *purdah* women, nor is it possible to ascertain from the materials furnished, whether those women have to necessarily remain unemployed by the introduction of the factory system, and whether they could not take to some other income producing work, like the charka.

Mr. Natarajan observes that the poverty and illiteracy of the workers were taken advantage of by the employers for giving certain concessions so that they could carry on their trade without regard to their welfare. He also found in the industry long hours of work with low wages, deplorable working conditions, unrestricted employment of women and children. The report recommended that legislation should be undertaken to regulate the working conditions of the workers in the beedi industry.

The three reports revealed a state of affairs which no civilised country could allow. The pitiable dependence of the illiterate women on what they were able to get from their employers, the insanitary conditions under which the work was done, and the large proportion of child labour, called for legislative interference. With the structure of the industry, as it existed, there was scope for evasion of any ameliorative legislation, as the industry does not depend on machinery or power, and even a big manufacturer could so arrange the units of his workers that no one of the units could be said to work in a factory.

In addition to the three reports referred to above, there was material in the shape of evidence of certain persons tendered before the Select Committee. The learned Advocate-General sought to refer to that evidence. We are, however of opinion that such evidence could not be looked into by the Court, even though the purpose for which it is tendered is to show the materials which the Legislature had before enacting the statute. In *Weaver* v. *Palmer Bros. Co.*[1], it was held that the invalidity of a statute might be shown by things which could be judicially noticed or by facts established by evidence. Evidence of the witnesses as set out in the proceedings of the Select Committee would belong to neither category. Reliance was placed on the decision in *Attorney-General for British Columbia* v. *Attorney-General for Canada*[2], where in deciding a question as to the constitutional validity of a provincial legislation, the Privy Council referred to the Report of the Royal Commission on *Price Spreads* on the ground, that when the suggestion was made that the legislation was not in truth criminal legislation but was in substance merely an encroachment on the provincial field, the existence of the report was a material circumstance. In *Ladore* v. *Bennett*[3], on a similar question the Privy Council referred to the Report of the Royal Commission appointed to enquire into the municipal and other local affairs of the municipalities in question, as indicating only the materials which the Government of the province had before them before promoting in the legislature the impugned statute, but not as evidence

1. 70 L. Ed. 654.
2. L.R. (1937) A.C. 368.
3. L.R. (1939) A.C. 468.

of facts they found. In *Pillai* v. *Mudanayake*[1], on the question of the validity of the Citizenship Act, 1948, of Ceylon, the Judicial Committee observed at page 528:

"It was common ground between the parties, and is in their Lordships' opinion the correct view, that judicial notice ought to be taken of such matters as the reports of Parlimentary Commissions and of such other facts as must be assumed to have been within the contemplation of the Legislature when the Acts in question were passed (cf. *Lador* v. *Bennet*)[2] and both parties have referred their Lordships to a number of paragraphs in the report of the Soulbury Commission, 1945."

In *State of Madras* v. *Rajagopalan*[3], the Supreme Court approved the principle laid down by the aforesaid decisions, and held that previous material which led up to a particular legislative provision was admissible in evidence. In *Arunachala Nadar* v. *State of Madras*[4], the Supreme Court, in considering whether the Madras Commercial Crops Markets Act, 1933, contravened the provisions of Article 19 (1) (*g*) and sub-clause (6) of the Constitution, referred to the reports of the Royal Commission on Agriculture, the Indian Central Banking Committee, and also of the expert committee appointed by the State Government to review the working of the Act. The cases referred to only recognized the admissibility of reports and similar public documents for the purpose of ascertaining whether the enactment was within the competence of a Legislature. The evidence of the witnesses tendered before the Select Committee could at best, only be hearsay. It, therefore, follows that, while the proceedings of the Select Committee could be looked into for the purpose of ascertaining that the Legislature proceeded to legislate on the proposed Bill after taking evidence, it cannot be relied for the purpose of ascertaining as to what the oral evidence before the Select Committee was, and whether such evidence disclosed a necessity or justification for the legislation. We are, therefore, of opinion that evidence recorded by the Select Committee on the Bill to regulate the work in the beedi industrial premises could not be looked into.

Independent of that evidence, there are enough materials in this case, namely, the admitted facts in the case, judicial recognition of the prevailing system, and the three reports, to which reference had already been made, as to the conditions of the industry which made out a case that legislation was imperative.

The Act proceeded to solve the problem by adopting two principles. (i) The entire manufacturing process, subject to the exceptions recognized in section 29, was to be carried on in licensed premises which could be equated to *factories*. (ii) The real manufacturer was to be made liable for the conditions of the work and wages. This was achieved by giving a comprehensive definition of the terms *employer* and *beedi industrial premises* used in the Act, and making licensing of beedi industrial premises compulsory. Under the general scheme of the Act, any manufacturing process in connection with the production of beedies should be carried out only in a beedi industrial premises which had to be licensed. The provisions of the Factories Act relating to hygienic condition and other similar amenities were incorporated in the Act. The provisions of the Madras Shop and Establishments Act relating to the working hours, overtime, spread over holidays, leave, etc., were similarly incorporated. The Payment of Wages Act, 1936, the Industrial Disputes Act, 1947 and the Industrial Employment (Standing Orders) Act, 1946, were also made applicable.

Section 3 requires all beedi industrial premises to be licenced. Section 4 sets out the conditions of the grant of a licence. Section 5 provides for appeal against orders refusing to grant or renew a licence. Section 6 provides for the appointment of Inspectors for the purposes of the Act, and section 7 defines the powers of the Inspectors. Sections 8 to 27, which provide for hygienic surroundings to the workers and also labour welfare and working conditions, are taken from Factories Act. Sections 30, 32, 34 and 35 are adaptations from the Factories Act. Section 31 is similar to section 41 of the Madras Shops and Establishments Act. Section 28

1. (1953) A.C. 514.
2. (1939) A.C. 468.
3. (1956) S.C.J. 19 : (1955) 2 S.C.R. 541 : (1955) 1 M.L.J. (S.C.) 12.
4. (1959) S.C.J. 297 : (1959) 1 M.L.J. (S.C.) 133 : (1959) 1 An.W.R. (S.C.) 133.

applies the Payment of Wages Act, section 36 the Industrial Employment (Standing Orders) Act and section 37, the Industrial Disputes Act, to the Beedi Industrial premises. Section 29 enables the Government to permit wetting and cutting of wrapping leaves by female employees outside the industrial premises in respect of which the employer is to maintain a record in the prescribed form. Sections 32 and 33 provide for penalities for the offences, and section 35 for the cognizance of the same. Section 33 renders any person who contravenes any of the provisions of the Act or any rule made thereunder, liable to punishment. For the first offence, the penalty is a fine which may extend to rupees two hundred and fifty and for second or subsequent offence, the penalty is imprisonment of not less than one month and not more than six months or fine or with both. Section 34 provides an indemnity for things done *bona fide* under the Act, section 40 invests a power with the Government to exempt any premises, industry or class of employees from the operation of the Act. Section 41 provides for the power to enact rules.

The important sections to which reference have to be made are :

Section 2 (*b*).—*Beedi industrial premises* means any place or premises, including the precincts thereof in any part of which any manufacturing process connected with the production of beedis is being carried on or is ordinarily carried on with or without the aid of power ;

Section 2 (*f*).—*Employee* means a person employed directly or through any agency whether for wages or not in any beedi industry to do any work, skilled, unskilled, manual or clerical and includes any person who is employed in such industry and declared by the Government by notification to be an employee for the purposes of this Act.

Section 2 (*g*).—*Employer* means the person who has the ultimate control over the affairs of any beedi industrial premises or who has, by reason of his advancing money, supplying goods or otherwise, a substantial interest in the control of the affairs of any beedi industrial premises and includes—

(i) a proprietor or a registered user of a trade mark registered under the Trade Marks Act 1940 (Central Act V of 1940), in relation to beedi ; and

(ii) any other person to whom the affairs of any beedi industrial premises are entrusted (whether such other person is called a managing agent, manager, superintendent or by any other name).

Section 2 (*j*).—*Manufacturing process* means any process for, or incidental to, making, finishing or packing or otherwise treating any article or substance with a view to its use, sale, transport, delivery or disposal as beedis ;

Section 3 : *Beedi industrial premises to be licensed.*—Save as otherwise provided in this Act, no place or premises shall, on and after such date as the Government may, by notification, specify in this behalf, be used as a beedi industrial premises without a licence obtained from the competent authority and except in accordance with the terms and conditions specified therein.

Section 4 : (1) *Licences.*—(1) Any person who intends to use any place or premises as a beedi industrial premises shall make an application in writing to the competent authority for a licence therefor, together with such particulars as may be prescribed.

(2) The application shall specify the maximum number of employees proposed to be employed at any time of the day in the place or premises and shall be accompanied by a plan of the place or premises prepared in such manner as may be prescribed.

(3) The competent authority shall, in deciding whether to grant or refuse a licence, have regard to the folllowing matters, namely :—

(*a*) the suitability of the place or premises which is proposed to be used for the manufacture of beedis ;

(*b*) the status and previous experience of the applicant ;

(*c*) the financial resources of the applicant including his financial capacity to meet the demands arising out of the provisions of the laws for the time being in force relating to welfare of labour ;

(*d*) whether the application is made *bona fide* on behalf of the applicant himself or *benami* on behalf of any other person ;

(*e*) whether the beedi manufactured by the applicant will be sold and marketed by himself or through a proprietor or a registered user of a trade mark registered under the Trade Marks Act, 1940 (Central Act V of 1940), in relation to beedi or any other person ;

(*f*) the welfare of labour in the locality ;

(*g*) the interest of the public generally ; and

(*h*) such other matters as may be prescribed.

(4) (*a*) A licence granted under this section shall be valid for a financial year and shall be renewed from financial year to financial year.

(*b*) The competent authority shall, in deciding whether to renew a licence or to refuse a renewal thereof, have regard to the matters specified in sub-section (3).

(5) The competent authority shall not grant or renew a licence unless it is satisfied that the provisions of this Act and the rules made thereunder have been substantially complied with.

(6) The competent authority may cancel or suspend any licence granted or renewed under this Act if it appears to it, after giving the holder thereof an opportunity of being heard, that such licence has been obtained by misrepresentation or fraud or that the licensee has contravened, or failed to comply with, any of the provisions of this Act, or the rules thereunder or any of the terms or conditions of the licence.

(7) The Government may issue to competent authorities such orders and directions of a general character as the Government may consider necessary in respect of any matter relating to licences under this section.

(8) Subject to the foregoing provisions of this section, the competent authority may grant or renew licences under this Act on such terms and conditions as it may determine. Where the competent authority refuses to grant or renew any licnece, it shall do so by an order communicated to the applicant, giving the reasons in writing for such refusal.

Section 5 : *Appeals*.—Any person aggrieved by the decision of the competent authority refusing to grant or renew a licence or cancelling a licence under section 4 may, within such time as may be prescribed, appeal to such authority as the Government may specify in this behalf and such authority may make such order in the case as it may think fit.

Section 29: *Special provisions*.—(1) The Government may permit the wetting or cutting of wrapping leaves by female employees outside the beedi industrial premises on an application made by the employer on behalf of such employees.

(2) The employer shall maintain in the prescribed form a record of the work permitted under sub-section (1) to be carried on outside the beedi industrial premises.

(3) Save as otherwise provided in this section, no employer shall require or allow any manufacturing process connected with the production of beedis to be carried on outside the beedi industrial premises.

Section 40 : *Power to exempt*.—The Government may, by notification, exempt, subject to such conditions and restrictions as they may impose—

(*a*) any beedi industrial premises,

(*b*) any beedi industry, or

(*c*) any class of employees,

from all or any of the provisions of this Act or of any rules made thereunder.

The definition of the term *beedi industrial premises* would be wide enough to cover even a private house, if the manufacturing of beedi or any part of that process is being carried out there. Section 3 provides that no place shall be used as a beedi industrial premises without a licence obtained from the competent authority and except in accordance with the terms and conditions specified therein. The terms *employer* and *employee* are so defined that an employer on whom several obligations under the Act are cast would comprehend a proprietor who does beedi business through his contractor. The contractor would also be an employer in regard to the workmen employed by him. If the contractor happens to supply the beedis manufactured to the proprietor and that proprietor has any substantial interest in the beedis so manufactured, the proprietor would be considered as employer for the persons employed under the contractor.

The contention urged on behalf of the petitioners is that the enforcement of the Act would effect a complete change in the industry by substituting a factory system in the manufacture of beedis in the place of what is essentially a cottage industry. The proprietor will be obliged to have a factory. Otherwise, he will be vicariously liable for the acts and omissions of his contractors without having any right to control them. It is said that the most remunerative form of doing business in the sale of beedi by entrusting the work of manufacture to contractors will be denied to him, and instead, he would have to take the risk and responsibility of having a factory with the onerous conditions attached to it by the Act, or be liable for the defaults of the contractor through whom he was doing business and thus he being denied a choice in the manner of doing his business. As regards the contractor, it is con-

tended that the Act by its economic operation would eliminate his business altogether. The contractor would, under the Act, be an cemployer, and would be bound to take out a licence and be liable as an employer to secure the amenities prescribed by the Act for all the places including the house of a worker. On behalf of the outworker, it was contended that the legislation will have the effect of denying to them the right of doing work at home, the part-time worker would be eliminated if the factory system were adopted, and the *purdah ladies* would share a similar fate and be denied the opportunity of earning a living. It was, therefore, contended that the Act, would result in the prohibition of the carrying on of their business by these persons and would amount to infringement of the fundamental right guaranteed under Article 19 (1) (*g*).

The Act does not, in terms, prohibit either a contractor or home worker from doing business. What it prescribes is that a licence should be taken for the premises in which beedi rolling is done. But there can be no doubt that the effect of the statute would be to deprive the home worker of manufacturing beedies in his home. The provisions relating to hygiene, and sanitation, etc., are too onerous to be observed by a home worker in his house. Even for a contractor or the proprietor, it would be difficult, if not impossible to provide the amenities for all the houses where the workmen reside and work.

In order to ascertain whether a statute deprives a citizen of his rights secured to him under the Constitution, it is well-settled that it is not the apparent form of the enactment, but its practical operation and effect that have to be considered. To ascertain whether the Legislature has transgressed the limits of its authority, the Court is entitled to look at the substance of the legislation, and not to confine itself to its mere form. In *Near* v. *Minnesota Ex. Rel. Olson*[1], Chief Justice Hughes observed at page 1363—

"With respect to these contentions it is enough to say that in passing upon constitutional questions the Court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect."

The same principle was stated in *Gregg Dyeing Co.* v. *Query*[2], where it was held that in maintaining rights asserted under the Constitution the decision of the Court must not depend upon the form of a scheme, and that the Court should regard the substance rather than the form, the controlling test being found in the operation and effect of the statute as applied and enforced by the State. In *Attorney-General for Alberta* v. *Attorney-General for Canada*[3], a question arose whether a provincial Act indirectly interfered with the powers of the Dominion, and whether it was or was not *ultra vires*. At page 130, Lord Maugham observed :

"The next step in a case of difficulty will be to examine the effect of the legislation. . . . For that purpose, the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be. Clearly, the Acts passed by the Provincial Legislature may be considered, for it is often impossible to determine the effect of the Act under examination without taking into account any other Act operating or intended to operate or recently operating in the Province.

A closely similar matter may also call for consideration, namely, the object or purpose of the Act n question. . . . .It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers, and a trespass on the exclusive powers of the other. . . .Here again, matters of which the Court would take judicial notice must be borne in mind, and other evidence in a case which calls for it. It must be remembered that the object or purpose of the Act in so far it does not plainly appear from its terms and its probable effect, is that of an incorporeal entity, namely, the Legislature, and generally speaking, the speeches of individuals would have little evidential weight."

That principle, namely, that it is not the form but the operation and effect of the Act that has to be looked into, would undoubtedly apply where the question is whether a particular statute is invalid as contravening the fundamental rights. In *Mohammad Yasin* v. *The Town Area Committee, Jalalabad and another*[4], the Supreme

1. 75 L. Ed. 1358.
2. 76 L. Ed. 1232.
3. (1939) A.C. 117.
4. (1952) S.C.R. 572 : 1952 S.C.J. 162.

Court in considering whether the bye-law enacted by the Municipality was *ultra vires*, held that, although in form there was no prohibition against carrying on any wholesale business by any person, in effect and in substance the bye-laws had brought about a total stoppage of the wholesale dealers' business in a commercial sense. The principle has been lucidly stated, if we may say so with respect, by Mukherjee, J., in *K. C. Gajapati Narayan Deo and others* v. *The State of Orissa*[1], at page 12 thus ;

"In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that Legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The Legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority. For the purpose of this investigation, the Court could certainly examine the effect of the legislation and take into consideration its object, purpose or design. But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the Legislature to exercise its powers.".

Although the Act does not in form prohibit the contract system of work or home work system as it now obtains in the beedi industry, it cannot be and has not been disputed that its object, purpose and effect will be to eliminate that system and put the beedi industry on a factory basis. That would undoubtedly result in the proprietor not being able to do business in the manner in which he has done so far. The business of the contractor would also be attenuated. He could continue his business only, if he obtains a licence for the premises where his workers do the manufacturing business. The out workers will have to get themselves employed in licensed premises and work under factory conditions.

The question for consideration, then, is whether the restrictions thus imposed by the Act on the various persons would be reasonable restrictions in the interest of the public so as to render the legislation valid. Mr. M. K. Nambiar, the learned counsel for the petitioners in Writ Petition Nos. 1141 and 1149 of 1959 subjected the provisions of the Act to a meticulous examination, and submitted that it made it impossible for the proprietor or a trade-mark holder, if he were to comply with the provisions thereof, to carry on his business in accordance with the prevailing contract system. The learned counsel contended that the definition of the word *employer* in section 2 (*g*) was so wide that the proprietor or trade-mark holder would be made liable for the acts and omissions of independent contractors, their employees and home workers, with whom he had no sort of contractual relationship, and over whom he had no manner of control whatsoever. The learned counsel further contended by the licensing system adopted by the Act, the employer would be compelled to take out licences for the premises of the home workers or independent contractors (sections 2 (*g*), 3, 4, 29 and 32 (4)) ; (ii) that the grant of the licence was dependent on the arbitrary will and pleasure of the authority, the conditions laid down by the Act being vague and indefinite ; (iii) that the term *employer* as defined would render him liable ; (*a*) for the due maintenance of the licensed premises (sections 8 to 16 and rules 13 to 28) over which he had no control; and (*b*) for the payment of wages and responsibility for the conditions of service of the workers with whom he had no contracutual relationship (sections 17 to 26 and rules 29 to 32). The imposition of such obligations, even according to the report of Mr. Natarajan, would be too onerous for any small beedi merchant to bear, unless State aid were given ; and above all the Act imposed a criminal liability under section 33 , sub-clauses (1) to (3) for violation of any of the provisions of the Act on the employer who had no control or relationship with the persons in respect of whom there had been infringement. It was contended that the effect of the provisions was to interefere seriously with the rights of the proprietor who would practically be denied the right to carry on his business.

1. (1954) S.C.R. 1 : 1953 S.C.J. 592.

The contention of Mr. K. V. Venkatasubramania Ayyar, the learned counsel who appeared for the petitioners in Writ Petition No. 1028 of 1959, is that every citizen is guaranteed under Article 19 (1) (*g*) a right to do a business of his choice in such manner as he may consider most beneficial to himself, and that, so long as there is nothing inherently immoral or vicious in the nature of the business, the Legislature, while it would have a right to regulate, cannot impose any restrictions in the conduct of the same in such a manner that it amounts to a prevention of a segment of the business. According to the learned counsel, the Act imposes not merely a restriction on the business, but actually prevents (i) the proprietor from carrying on a business on the contract system as he was accustomed to do, that is, in such manner as he may choose, (ii) the contractor from doing business and (iii) the home worker from doing business of his own or as a part-time engagement, as the conditions imposed by the Act are too onerous to enable them to carry on the business as before. The further contention is that the grant of licence under sections 3 and 4 being discretionary, a person would not be entitled to obtain the licence as of right, and that, therefore, the imposition of licence for carrying on a business in the manufacture and sale of beedis would amount to an unauthorized restriction in regard to the same.

The Act does not prevent any person from manufacturing beedis and it cannot be said that there has been any prohibition of the business in manufacturing and selling beedis. The petitioners could continue their business but what the Act in substance requires is that the manufacturing part of the business should be carried on in licensed premises, with the result that the workers engaged in the manufacturing process could work only in such premises, where the sanitary and other amenities would be provided by the employer. The contract system could be adopted, but the contractor who would also be an employer would have to obtain a licence for the work place and act in conformity with the conditions thereof.

The learned counsel for the petitioner contended that the restrictions imposed are unconstitutional in that the traditional method of beedi manufacture could no longer be continued, and that the liberty of the individual regarding the choice and manner of conducting it was impaired. In support of that contention reliance was placed on the observations of several eminent Judges of the Supreme Court of America.

Before considering the decisions of the American Courts, it would be useful to refer first to the provisions of the Fifth and the Fourteenth Amendments of the American Constitution. The Fifth Amendment, which related to Federal Legislation, provided that no person would be deprived of life, liberty and property without due process of law. The Fourteenth Amendment related to the State laws. Section 1 of that amendment prohibited a State from making or enforcing any law abridging the privileges or immunities of citizens of the United States, from depriving any person of life, liberty and property without due process of law, and from denying to any person within its jurisdiction equal protection of law. The terms *due process of law* has been held to be synonymous with the law of the land. It recognised the fundamental personal and property right and freedom of an individual from arbitrary and unnecessary restrictions and exactions. Such laws would be invalid. But it has been held that *due process* requires only that the law should not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained. It was also recognized in the American Jurisprudence that the State would have an inherent power, called Police power, by which it could impose such restrictions upon the fundamental rights as are necessary for the protection of the common good, namely, public health, safety and morals. Such a power also called internal Police power is held to be inherent in every soverignty to the extent of its dominion,

> " to advances the safety, happiness of people and to provide for its general welfare."

The power is regulatory in nature and is defined in *Rottschaefer's Constitutional Law*, at page 451 thus—

"The regulatory power of the States is known as their Police power, and is broadly definable as their power to regulate their internal affairs for the protection and promotion of the public health safety and morals, and of the general welfare."

The Federal Government has also a similar power in regard to the subject to legislation which it possesses.

Thus the powers of regulation which a State could possess would very often be the result of judicial adjudication of the question whether the deprivation of the rights of an individual was by *due process* or as a result of the Police power of the State. There was no express provision in the American Constitution like Article 19 (2) to (6) of our Constitution specifying the extent to which the exercise of the fundamental rights by an individual could be restricted. The point of view from which invasion of the individual's right by the State could be justified would, by the very nature of the subject-matter, be influenced to some extent at least by the current ideas of social philosophy varying from *laisseiz faire* of the nineteenth century to the modern ideas of a welfare State. It would, therefore, be more apposite to look to the later decisions of the American Courts for guidance in the interpretation of Article 19 (6). We shall now consider the cases relied on by the petitioner.

In *Smith* v. *Texas*[1], the validity of a State Legislation, which made it a misdemeanour for a person to act as conductor of a passenger train without having served for two years as a conductor or break-man in a freight train. The respondent in that case was not so qualified as a break-man or conductor, but he had been for several years working as fire man and engineer of both passenger and frieght trains. In declaring the statute invalid, Lamar, J., observed at page 1132—

"Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independant rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labour his liberty is restricted, his capacity to earn wages and acquire, labour, his liberty is restricted, and he is denied the protection which the property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the cons-constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling".

The learned Judge recognized that qualifications might be reasonably necessary for protecting public, and that the State could validly prescribe qualifications and require an examination to test fitness of any person for engaging him in a public calling or service. The extent to which prior experience might be made a condition precedent to the pursuit of trade was held to depend upon reasonableness of such requirements and the degree to which the protection of public interest demands. It was held that it was unreasonable to require that conductors of passenger trains should have served two years as conductors of frieght train or as break-men, while the candidates were otherwise competent for the job. It must be noticed that the actual decision was not based on any theory of an unrestricted liberty to do a business but on the reasonableness of the requirements prescribed for the occupation in question.

In *New State Ice Co* v. *Liebmann*[2], a State legislation required a licence or permit for manufacturing selling and distributing ice. The legislation provided that a licence could be refused to any applicant, except on proof of necessity for the supply of ice at the place where the business was sought to be established. The result of such a provision was a denial of a right to do business where the prevailing supply was sufficient to meet the needs of that place, thus indirectly creating a monopoly in the existing persons. The licensing provisions were thus in essence a permit system. The Court held that as the business was a private one, not one charged with public use, the State would have no power under the Fourteenth Amendment arbitrarily to deny and unreasonably curtail the common right to engage in a lawful private business, such as the manufacture and sale of ice. Sutherland, J., observed at pages 754 and 755:

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1. 58 L. Ed. 1129. 2. 76 L. Ed. 747.

"Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. . . . . .

The opportunity to apply one's labour and skill in an ordinary occupation with the proper regard for all reasonable regulations is no less entitled to protection.

The decision declaring the statute invalid was rested on the ground that the business was *an ordinary private business* and not one which could be said to be *affected with public interest.* Formerly, under the law obtaining in America, the business was classified into (i) private and (ii) those affected with public interest. The distinction was useful to facilitate the regulating of the business by the State in exercise of its Police power, the latter class of business being open to such control, while the former was not. That theory however was later abandoned. It was held that the Police power of a State could be exercised both in respect of a business charged with public use and a private one so long as the object sought to be achieved by legislation was for the public good. In *Nebbia* v. *New York*[1], the Court observed :

"It is clear that there is no closed class or category of businesses affected with publuc interest, and the function of Courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of Governmental authority or condemn it as arbitrary or discriminatory. . . . . The phrase *affected with a public interest* can in the nature of things, mean no more than that an industry for adequate reason, is subject to control for the public good.

The decision in the *New State Ice Company's case*[2], proceeding as it does that private businesses could not be regulated by the State, could have no application in the interpretation of Article 19 of our Constitution which recognizes, restrictions on the individual rights ; nor has that principle been accepted by the later American decisions.

Jiggett Co. v. *Baldrige*[3], was the case next relied on. In that case the validity of a State legislation, which required that a person owning a pharmacy should be qualified and registered as a pharmacist, was impugned. It was held that a business is a right of property entitled to protection against State legislation. The Court recognized that a State could prescribe by appropirate legislation for the prescription, compounding of prescriptions, purchases and sale of medicines, etc., in order to protect public interest, but it held that the impugned statute went beyond this in that it required that even for owning the business, such qualifications were necessary. This is made clear by the following observations at page 209 :

"The Act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with *ownesrship*. It plaintly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A State cannot, *under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them*...............

In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health ; and that the Act in question creates an unreasonable and unnecessary restriction upon private business.

What then the case decided was not that there could be no restriction in regard to a business but the restriction imposed, *viz.*, the special qualification for the ownership of property was unreasonable.

It was urged on behalf of the petitioners that there could be no regulation of a business so long as there was nothing inherently immoral or vicious about it, and it cannot be said there would be any scope for the exercise of the Police power of the State to restrict such a business . Support for the said doctrine is sought in the observations of Mac Reynolds, J., in *Adams* v. *Tanner*[4]—

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly

1. 78 L. Ed. 940, 956.
2. 76 L. Ed. 747.
3. 73 L. Ed. 204.
4. 61 L. Ed. 1336.

no business which does not offer peculiar opportunities for reprehensive practices ; and as to every one of them, no doubt some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guarantees of the Constitution cannot be freely sub-merged if and whenever some ostensible justification is advanced and the police power invoked."

Brandeis, J., expressed dissent. In that case a statute made it illegal for an employment agency to collect fees from workers for furnishing them with employment chances or with information leading thereto. It was held that prohibition and not regulation was what was aimed at by the provisions of the statute and that the right of an individual to engage in useful and lawful business was unwarrantably infringed by the provisions of the statute. The argument that abuses that exist in business could not be restrained even reasonably in the interests of the public cannot, therefore, be sustained on the basis of the above observations. *Adams* v. *Tanner*[1], proceeded on the basis that there was a total prohibition of that business. But even so it cannot be said that the Supreme Court of America has unqualifiedly accepted the principles laid down in that case in the latter cases. In *Olsen* v. *Nebraska*[2], a State statute fixing the maximum compensation which a private employment agency may collect from an applicant for employment was held to be valid the business being one subject to the control for public good. The decision expressly overrules the decision in *Ribnik* v. *Mc Bride*[3]. It was contended by Mr. K. V. Venkatasubramania Ayyar that the effect of the decision in *Olsen's case*[2], was to discredit the doctrine of *laissiez faire* and that it could not in any way be held to be in conflict with the principles laid down in *Adams* v. *Tanner*[1]. We cannot, however, agree with this. The decision in *Olsen's Case*[2], has certainly undermined the basis of the decision in *Adams* v. *Tanner*[1]. That recognized the principle that there could be a restriction or regulation of a business even if there was nothing inherently vicious or harmful about it. In *Nebbia* v. *New York*[4], Roberts, J., who delivered the judgment of the Court observed at page 958 thus :

"The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people."

In *West Coast Hotel Company* v. *Parrish*[5], the validity of a statute authorizing fixation of minimum wages for women and minors by the State authority was considered and upheld as a proper exercise of the police power of the State. Chief Justice Hughes observed at page 708 :

"In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom ? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraint of due process, and regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process."

It cannot, therefore, be said that the decisions of the Supreme Court of America support an unqualified or absolute right in doing business. Though a trade or business would be protected as coming within the liberty clause contained in the Fourteenth Amendment such liberty would be conditioned by the public weal and regulations of the individual's right could be made in the interests of the public.

Article 19 (1) (*g*) of our Constitution confers fundamental right to carry on business. The provisions in sub-clause 6 enables the law to prescribe reasonable restraints on such rights in the interest of the public. The article contains no express guarantee in regard to the methods or the manner of doing business. The guarantee is in regard to the business as a whole. Even in respect of that right, restrictions could be imposed provided they are reasonable and also necessary in the public

1. 61 L. Ed. 1336.
2. 85 L. Ed. 1305.
3. 72 L. Ed. 93.
4. 78 L. Ed. 940.
5. 81 L. Ed. 703.

interest. The reasonableness of such restrictions is not to be judged only from the point of view of the individual affected but also from the point of view of the public, namely, whether the restrictions imposed are reasonable and related to the objects sought to be achieved by a legislation.

Mr. Venkatasubramania Iyer next contended that, the restrictions imposed under the Act are in the nature of *advance restrictions* and would be contrary to the fundamental rights of the individual, as it could not be said to be a regulation but an anticipatory prevention of it. He relied in this connection upon the decision *Murdock* v. *Pennsylvania*[1]. In that case the impugned law required that persons who solicited or canvassed business in a city should obtain a licence, the fee for which was fixed at a flat rate. Certain persons belonging to a religious sect, who were known as *Jehova's witnesses*, were prosecuted for disseminating religious literature without taking a licence. Although religious sects collected monies for the pictures, literature, *etc.*, sold by them to the inhabitants, it was held by a majority of the Judges that the activities of the sect were religious rather than commercial and the tax levied on such persons interfered with the freedom of religion, and, therefore, unconstitutional . It was urged before us that under the First Amendment to the American Constitution, only the freedom of the press, freedom of speech and the freedom of religion and freedom of assembly referred to sometimes as *preferred freedom* were guaranteed, and that it was, by virtue of the Fifth and Fourteenth Amendments that the Federal and the State Governments were prohibited from depriving any person of life, liberty and property without due process of law. Liberty under the Fifth and the Fourteenth Amendments were first considered to relate to personal liberty as envisaged in clause thirty-nine of the *Magna Carta* and it was only as late as 1897, that it was recognized that liberty would include liberty of the faculties. Reference was made to *Allgeyer* v. *State of Louisiana*[2], for the following observations made therein :

"The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties ; to be free to use them in all lawful ways ; to live and work where he will, to earn his livelihood by any lawful calling ; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

The contention advanced by the learned Counsel for the petitioner was that the freedoms guaranteed under article 19 of our Constitution are similar to the *preferred freedoms* in America, there being specific constitutional provision in regard to them, and that, therefore, the same standard of protection that the American Law gave to the *preferred freedoms, e.g.*, religious freedom, should be accorded in India to all the constitutionally guaranteed freedoms. It was, therefore, urged that the principle of the decision in *Murdock* v. *Pennsylvania*[1] should be adopted when a statute restricts the fundamental right of carrying on a business which may not perhaps carry the same protection in America, not being one of the preferred freedoms.

We cannot, however, accept the argument. Article 19 itself makes a distinction in regard to restrictions that may be imposed on the several freedoms enumerated therein. The freedoms guaranteed under article 19 (1) (*f*) and (*g*) are subjec to reasonable restrictions that may be imposed in the interest of the public, whereas the freedoms guaranteed in respect of speech, assembly, association and movement and settling in any part of the territory of India could be subjected only to a different type of restrictions. Therefore, the principle applicable to the cases of freedom enumerated in article 19 (1) (*a*) to (*d*) cannot be held to apply to those under clauses (*f*) and (*g*).

A similar argument was advanced in *Ananthakrishnan* v. *State of Madras*[3], where it was held that the decision in *Murdock* v. *Pennsylvania*[1], could not apply to the freedoms relating to property and trade, but only to the three freedoms mentioned in

1. 87 L. Ed. 1292.
2. 41 L. Ed. 832.
3. (1952) 1 M.L.J. 208: I.L.R. (1952) Mad. 933.

the First Amendment of the American Constitution. But even so it was urged that desirable ends could not be achieved by prohibited means, and when a statute attempted to curtail the freedom of contract and the enjoyment of privileges enjoyed till now in the manner of doing a business, it was transgressing the limits of constitutionality. In support of that contention reference was made to certain passages in the decision reported in *Mayer* v. *Nebraska*[1], at page 1045, where it was observed that liberty denoted not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Pierce v. *Society of Sisters of Holy Names*[2], was also referred to.

The two cases related to the freedom of teaching and learning. In the former the statute prohibited teaching in any school or building in any foreign language, and the teaching of the other (*sic*) subject except in English, before the pupil had passed a particular stage. In the latter case, the impugned statute required all children to attend public schools and prohibited the parents from providing for the education of their children in any private school. It was held in both the cases that the statutes amounted to an unconstitutional interference with the liberty of parents with regard to education of their children.

Freedom of speech, expression of religion, etc., are diffierent from freedom of holding property or of practice of a business or trade and they cannot be judged by the same standards. The limitations in regard to the former type imposed by the Constitution are different from those on the latter. Decisions of Court rendered when there was an infringement of the former could not always be applied when the infringement complained of was with respect to the latter.

The contentions of the learned Counsel for the petitioner would, in their logical sequence, imply that there should be no restriction of an individual's business even if that were to result in an injury to the public. That the carrying on of a business or the entering into of contracts by an individual should be free from State interference cannot mean that such rights could be exercised in detriment of others or in such a manner as to nullify the correlative rights of the State to improve the general welfare and to raise the standard of living of its citizens. Society is as much entitled to the pursuit and enjoyment of happiness as the individual. In a welfare state where the State is engaged in improving the living conditions of persons in the lower rungs of society, it would be impossible to recognize any unrestricted or unlimited freedom of business. It stands to reason, therefore, that the manufacturer or proprietor should not be allowed to exploit the misery of the workers. An individual's right to conduct his business must necessarily be considered in relation to the social organization of which he is a member. The American cases, referred to already, for from laying down any different principle, uphold it. Liberty was held always to be subject to restraints and regulations adopted in the interests of the community, reasonable in relation to the subject. In the words of Roberts J., in *Nebbia* v. *New York*[3]:

"Equally fundamental with the private right is public right to regulate it."

But there is bound to be conflict in the actual exercise of the individual and the society of their respective rights. Article 19 of our Constitution strikes a balance between such conflicting rights. It guarantees an individual the seven freedoms mentioned in that article and the religious freedom mentioned in article 25. But it also empowers the State to restrict such rights in the interest of the public in certain circumstances. In *A. K. Gopalan* v. *The State*[4], Mukherjea J., observed at page 253:

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1. 67 L. Ed. 1042.
2. 69 L. Ed. 1070.
3. 78 L. Ed. 940.
4. (1950) 2 M.L.J. 42 : (1950) S.C.J. 174 : 1950 S.C.R. 88.

"The object of the framers of the Constitution obviously is to enumerate and guarantee those forms of liberty which come under well-known categories recognized by constitutional writers and are considered to be fundamental and of vital importance to the community.

There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restriant for that would lead to anarchy and disorder. The possession and enjoyment of all rights......are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community. The question,therefore, arises in each case of adjusting the conflicting interests of the individual and of the society. In some cases, restrictions have to beplaced upon free exercise of individual rights to safeguard the interests of the society ; on the other hand, social control which exists for public good has got to be restrained, lest it should be misused to the detriment of individual rights and liberties. Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand for the very protection of these liberties the society must arm itself with certain powers...No man's liberty would be worth its name if it can be voilated with impunity by any wrongdoer and if his property or possessions could be prayed upon by a thief or a marauder. The society, therefore has got to exercise certain powers for the protection of these liberties......What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control."

The point for consideration, therefore, is not so much as to whether every interference by State with the individual's fundamental right is invalid, but whether, a particular invasion by a statute is one beyond the provisions of article 19 (6), *viz.*, whether it is not a reasonable restriction made in the interest of the public. That a person has a fundamental right to carry on a business does not necessarily mean that he has fundamental right in adopting a particular mode of conducting the business. In *T. B. Ibrahim* v. *Regional Transport Authority, Tanjore*[1], a similar contention was rejected. In that case the transport authority altered a bus terminus from its original place to a different one. By reason thereof the owner of the site was deprived of the income he used to enjoy when his property was used as the bus-stand. The Supreme Court refused to recognize any fundamental right in the individual to carry on business wherever he choose, and held that his right must be subject to any reasonable restriction imposed by the executive authority in the interest of the public convenience, and that, although the restriction might have the effect of eliminating the use to which the bus-stand had been put till that date, it could not be regarded as unreasonable.

On the footing that what the Act aims at is a prohibition and not a mere regulation of the beedi manufacturing business, it was contended that the legislation would be invalid ; the reason advanced was that article 19(6) empowers the legisture (provided the other conditions are satisfied) only to restrict the right guaranteed under article 19(1) (*g*) and not to prohibit or put an end to it, as the word *restriction* connotes an idea of the right continuing to exist in some form. Learned Counsel relied upon the decision reported in *Municipal Corporation of City of Toronto* v. *Virgo*[2], *Attorney-General for Ontorio* v. *Attorney-General for the Dominion*[3], *Lachmeswar Prasad Shukul* v. *Girdhari Lal Chaudhuri*[4], *Stone* v. *Farmers Loan and Trust Co*[5], and *Weaver* v. *Palmer Bros.*[6]. That question has been left open by the Supreme Court in *Mohd. Hanif Quareshi* v. *The State of Bihar*[7]. It is unnecessary, for the purpose of the present case, to decide whether the restrictions contemplated by article 19 (6) would not include prohibition,as in our opinion,there has been no prohibition of the beedi manufacture by the Act. The proprietor could continue to manufacture beedis but only certain obligations are imposed on him in so doing. The middlemen could still carry on the business after obtaining the licence. The home worker too can carry on his business, but he is required to do so in a licensed premises. It, therefore, follows that there has been no prohibition of the business of manufacture

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1. (1953) 1 M.L.J. 205 : (1953) S.C.J. 31 : 1953 S.C.R. 290.
2. (1896) A.C. 88.
3. (1896) A.C. 348.
4. 1940 F.C.R. 17, 26.
5. 29 L. Ed. 636.
6. 70 L. Ed. 654.
7. (1958) M.L.J. (Crl.) 727 : (1958) S.C.J. 975 : 1959 S.C.R. 629.

and sale of beedis, though there is a restriction or regulation in regard to the mode of manufacture.

It was next contended that the requirements as to licensing contained in sections 3 and 4 of the Act are in the nature of a permit system, and, therefore, invalid. It was admitted, indeed there cannot be any possibility of doubt on that matter, that no naked or arbitrary power is granted to the authority to issue or refuse a licence. The statute has fixed standards, and indicated the grounds which would be relevant for the issue of a licence. The power given is a *quasi* judicial one with right of appeal to the aggrieved person. But yet it is said that there is an element of precariousness about the exercise of the power in that a person who obtained a licence for one year could not demand as of right for a renewal. That according to the learned Counsel would leave continuance of an individual business at the mercy of the licensing authority as the provisions of the Act require that licence should be renewed every year. This is stated to be midway in the swing of the pendulum between a licence properly so called and a permit. According to the learned Counsel where regulations are made in the matter of the exercise of an individual of his fundamental right by adopting a licensing system, the licence should be obtainable as a matter of right on the payment of the necessary fee, and that any system by which the issue of a licence is made dependent on the discretion of an authority would carry with it some degree of uncertainty or precariousness and a scope for the exercise of an arbitrary power; it should, therefore, be held to be violative of the fundamental right. We cannot agree with the contention. In Rottschaefer's *Constitutional Law*, it is stated at page 466:

"It has been judicially affirmed that a State is free, notwithstanding the due process and equal protection clauses 'to adopt whatever economic policy may reasonably be deemed to promote the public wlefare, and to enforce that policy by legislation adapted to that purpose'. It may, therefore, impose restrictions on the right to enter a business or profession if those restrictions are reasonable means for protecting or promoting the general welfare. A common form of regulation of this character is requiring a licence as a condition precedent to pursuing certain businesses and professions. The essence of such a requirement is generally the necessity for procuring the consent of the State before a person may lawfully pursue the licensed business or calling. The due process clause permits a State to impose this condition upon the right to pursue practically all, if not all, the ordinary businesses and callings, even those that it could not validly prohibit absolutely........The reasoning on which the power to impose this requirement in those cases was based is broad enough to warrant the conclusion that the mere imposition of this requirement would in no case violate due process.

It cannot, therefore, be said that the mere requirement that the beedi industrial premises should be licensed would be invalid. But any system of licensing which leaves the issue of the licence to the unfettered discretion of the executive would amount to a permit system and would be invalid restraint on the exercise of the fundamental right. That, however, cannot be said of the powers granted under sections 4 and 5 of the Act.

Under section 4 of the Act, the authority could only act in conformity with the provisions of the Act, failing which the aggrieved party could appeal. If even the appellate authority acts arbitrarily, it would be open to this Court to correct such errors under article 226. A *quasi* judicial power cannot be said to be either naked or arbitrary. It has to be exercised objectively in accordance with the standards laid down by the statute. There could, therefore, be no valid objection to the regulation of beedi business by reason of the provisions of sections 3 to 5 of the Act.

The substantial question, then, to be considered is whether the restrictions imposed by the Act are reasonable and in the interests of the public. Considerable reliance was placed on the observations of the Supreme Court in *Chintaman Rao* v. *The State of Madhya Pradesh*[1]. In that case, the law of a State with the object of providing labour for agricultural operations, prohibited the beedi manufacture during the agricultural season. It was held that the object of the statute, namely, to provide measurers for the supply of adequate labour for agricultural purpose

1. (1950) S.C.J. 571 : 1950 S.C.R. 759.

in the beedi manufacturing areas of the province could be achieved by legislation restraining the employment of agricultural labourers alone in the beedi manufacture during that agricultural season without prohibiting all the persons, whether agricultural labourers or other labourers, from engaging themselves in beedi manufacture. The provisions of the Act were, therefore, held to have no reasonable relation to the object in view. Mahajan J., observed that the phrase *reasonable restriction* would be inconsistent with a restriction which arbitrarily or excessively invaded the fundamental right, and that, in order to be valid, the restriction should strike a proper balance between the freedom guaranteed under article 19 (1) (*g*) and the social control permited by article 19 (6). The learned Judge observed at page 763 :

"The statute in substance and effect suspends altogether the right mentioned in article 19 (1) (*g*) during the agricultural seasons and such suspensions may lead to such dislocation of the industry as to prove its ultimate ruin. The object of the statute is to provide measures for the supply of adequate labour for agricultural purposes in beedi manufacturing areas of the Province and it could well be achieved by legislation restraining the employment of agricultural labour in the manufacture of beedis during the agricultural season. Even in point of time a restriction may well have been reasonable if it amounted to a regulation of the hours of work in the business. Such legislation though it would limit the field for recruiting persons for the manufacture of beedis and regulate the hours of theworking of theindustry, would not have amounted to a complete stoppage of the business of manufacture and might well have been within the ambit of clause (6). The effect of the provisions of the Act, however, has no reasonable relation to the object in view but is so drastic in scope that it goes much in excess of that object."

The enactment in that case which prohibited beedi manufacture entirely during the agricultural season was in excess of what was necessary and there was no reasonable or just relation between the restrictions imposed and the object sought to be achieved by the legislation. In the present case, however, the legislation is directed to regulate the conditions of working of the labourers engaged in the beedi business. No question of stoppage of the business at all arises. The legislation only limits the number of (*sic*) doing the business and that too is done with a view to secure a benefit for the workers. In the absence of such restrictions the object of Act cannot be achieved.

Mr. Nambiar contended that there was no necessity for imposing a restriction as the existing factory and labour legislation would be sufficient to improve the position of the workers. We have already pointed out that the existing legislation was quite inadequate to achieve the object of the legislature, as evasion was easy and frequently resorted to, and that the Act was enacted with a view only to check the evasion of those statutes.

Learned Counsel next contended that the Act has imposed unreasonable restrictions on proprietors of beedi business by giving a wide definition of the term *employer* which will bring within its fold a number of persons who would be made liable vicariously for the duties and penalties imposed by the Act.

The term *employer* as defined would include the following persons : (i) a person who has ultimate control over the affairs of any beedi industrial premises, (ii) a person who has by reason of his advancing money, supplying goods or otherwise, a substantial interest in the control of the affairs of any beedi industrial premises, (iii) a proprietor or a registered user of a trade mark registered under the Trade Marks Act in relation to beedi and (iv) any other person to whom the affairs of any beedi industrial premises are entrusted.

Under the Act, the employer has the duty of implementing the various requirements prescribed therein and he would be liable for any omission to comply with them. There could be no objection to the definition so far as it covers the first of the four categories mentioned above. There is nothig unreasonable in making a person who has ultimate control over the beedi industrial premises responsible for the enforcement of the provisions of the Act. The factories Act contains a similar definition. See the definition of *occupier*. The second category presents some difficulty. The object of this part of the definition was to apply the Act to proprietors of beedi business who adopting the device of ostensibly entering into a contract with middle men escaped liability of employers under the factory

and labour welfare legislations. The learned Advocate-General sought to contend by a reference to a number of English cases that middle men or branch managers of the type that have come into beedi business, could not be held to have *an independant calling*, but would in reality be servants of the proprietor and would be the employees of the proprietor. We consider that it is unnecessary to consider those decisions for the following reasons.

The Supreme Court has considered the position of a contractor in *Shri Chintaman Rao & another* v. *The State of Madhya Pradesh*[1], and held that *Sattedars* or persons, who were analogous to the branch managers in this part of the country who, for a consideration, in their own factories or by arrangement with third parties got the beedis made, would not be the employees of the proprietor but only independent contractors. The Supreme Court also pointed out that it could not be laid down as general proposition that under no circumstances could the *Sattedar* be considered as a worker, and that the question had to be decided upon the terms of contract entered into between him and the employer. Recently one of us had to consider a similar question in a decision reported in *Abdul Rahim & Co.* v. *N.A. Beedi Workers Union*[2]. The various tests that could properly be applied for determining whether the relationship of employer and employee subsisted between a proprietor, middlemen and workers was considered in that case. The question, therefore, cannot be approached as a pure question of law. Secondly, the statute with a view to solve this uncertainty and with the particular object of bringing within the ambit of the Act persons, who are *de facto* the employers, had created a fiction by making a person who has a substantial interest in the business, an employer.

The terms, as defined, will include a person who gets beedis manufactured on the contract system, but having a control over the business, though under the common law he may not be one such. The result of it will be, that such a person should either do the business subject to all the liabilities imposed by the Act or cease to do that type of business. The question is whether such a comprehensive difinition is reasonable. That the question has to be considered on the basis of the historical and other background of the legislation is settled by the authorities. In Rottschaefer on *Constitutional Law*, at page 459, it is observed—

"The reasonableness of the Legislature's action, however, cannot ordinarily be determined without considering the factual situation existing when the legislation was enacted. It is only by taking account thereof that a Court can determine the reasonableness of the legislative judgment that evils existed and that the means adopted for dealing with them had a real and substantial relation to the attainment of the object aimed at. It is, therefore, essential that the factual background of such legislation be considered, and this requires that it be before the Court when it passes on its validity. The facts may be of such character that the Court can take judicial notice of them, but, if not of that class, they are properly the subject of evidence which should be presented to the Court so that the decision of the constitutional issue can be based on adequate factual support. This consideration is primarilv important in its relation to the presumption of validity that attaches to all legislative action."

We have already referred to the circumstances under which the legislation came to be enacted. More than one committee found that the Factories Act, etc., were skilfully evaded by the simple device of engaging contractors and that for the well being of the large number of workers, the factory system should be introduced. The purposes of the legislation could not be achieved if the definition of the term *employer* were to be confined only to *de jure* employer. Very often, the so-called independent contractor was a man of straw, there was very little independence in him, as the provisions of the typical contract to which we made reference earlier would show. In a case where the manufacturing process is controlled by a person having a substantial interest therein, the economic reality is, that that person is the employer. The fiction enacted by the section is for the purpose of making such a person who could be said to be the *de facto* proprietor responsible as an employer. No doubt the Act imposes a fair amount of vicarious liabilities on the proprietor of the trade mark, if he wants to have his beedis manufactured in premises other than those over which he has a direct control. Imposition of vicarious liability is by itself and with

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1. (1958) M.L.J. (Crl.) 569 : (1958) S.C.J. 753 : 1958 S.C.R. 1340.
2. (1958) 2 M.L.J. 573.

nothing more cannot always be viewed as unconstitutional. In the present case, we have pointed out that the legal fiction of making such a proprietor an employer subjected to all the statutory rights and liabilities of an employer really accords with the economic reality. The imposition of liabilities, apparently vicarious, does not amount to an unconstitutional restriction of the fundamental rights of the proprietor.

It was contended that on the terms of the definition, a person who merely purchases from another, beedi and sells it as a owner would be liable. That however is not correct. The terms of the section provides that, an employer should have a substantial interest in the control of the affairs of the beedi business by reason of his advancing money, supplying goods or otherwise. The liability of such an employer would be analogous to that of a guarantor and having regard to the fact that such a person has a control over the business, it cannot be said that the legislation imposing an obligation on him, to see to his branch manager complying with the provisions of the Act is unreasonable. Further the question whether a person has sufficient interest so as to make him liable as an employer would be a justiciable one. It cannot, therefore, be said that the definition was in any measure unrelated to the object which the Legislature had in view to set right the evil that enveloped the system of beedi manufacture. We are, therefore, of opinion that the first and second limbs of the definition are reasonable and, therefore, valid.

That however cannot be said of the third limb which makes a trade mark holder or registered user liable. On the terms of the definition, a person who merely purchased beedis in the market, and sold them by using his own trade mark would be liable for the defaults of the person from whom he purchased the beedis. The learned Advocate-General contended that the definition in section 2 (*g*) (*i*) should be read in conjection with the provisions of section 4 (3) (*e*) which enacts that the supplier of the beedis should be exclusively connected with the proprietor or registered user of the trade mark, and that therefore, the statute aimed at those cases in which beedis were manufactured by an independent contractor exclusively for the proprietor of a trade mark. No such restricted interpretation could be given to section 2 (*g*) (i). In its actual application the provision will produce perhaps unintended results contrary to the constitutional guarantees. Suppose a manufacturer of beedis supplied to various owners who have separate trade marks ; it will be unreasonable to hold that one trade mark owner should be answerable for the beedis manufactured for another. Yet that is what would happen, if the definition is allowed to remain. In our opinion the definition contained in section 2 (*g*) which included proprietor or the registered user of trade mark is unreasonable and unrelated to the mischief sought to be remedied. The case of a proprietor of a trade mark who is substantially interested and has control over the affairs of another beedi industrial premises would be covered by second limb of the definition, and there would really be no necessity for the third. It is not necessary for the purpose of securing proper conditions of work for the beedi workers that all purchasers of beedis manufactured by them if they happen to market under their own trade mark should be made liable as their employers. We are, therefore, of opinion that section 2 (*g*) (*i*) is invalid and has to be struck down.

It cannot be disputed that the case of a manager or similar authority covered by section 2 (*g*) (ii) would be constitutional.

The next objection to the licensing provision is that the criteria laid down by section 4 are vague and unrelated to the requirements of trade, and would be arbitrary in operation, far in excess of the public interest or public welfare. It is not, however, stated as to how any lesser standard would have met the evil in the trade. There was ample material before the Legislature to show that a substantial portion of the employers are running it by remaining behind the screen and the requirements set out in section 4 were evidently prescribed in order to ascertain who the real employer was. As stated already the grant of a licence could not be arbitrary but judicial.

It is contended that the various provisions in the enactment would render it impossible for the worker manufacturing beedis in his own house ; and that sections 8 to 28 are unreasonable in regard to a private residence. Further objection was taken to the provision which empowers the Inspector to inspect the premises in which *purdah* ladies might be residing. Such difficulties can never arise as the effect of the Act will be to confine the beedi manufacturing process to factories.

There is no basis for the contention that the women workers would be rendered without employment. In the report of Mr. Narayanaswami Naidu, it is stated that almost all the workers except in Mukkudal area were full time labourers. It is not shown how all of them would be rendered unemployed by the mere process of converting the industry into a factory controlled one. Even in the Mukkudal area, it is not shown how many workers would be rendered unemployed by the adoption of the factory system. It is no doubt contended that some workers particularly the part-time workers and some *purdah* ladies, would lose their employment if the provisions of the Act were to be enforced. That may be so. No materials are placed before us to find as to how many of the workers will have to go unemployed. The fact that factory system is to be introduced cannot mean that all women will go out of work. Many may be willing to work in the factories, and with the prospects of fair pay, regulated work and better conditions of labour, many of the present workers might prefer to do the work in the factories. Further the Act has provided for a part of the beedi rolling work being done outside the licensed premises. Wetting or cutting of wrapper leaves is an integral part of the manufacturing process. Section 29 provides that on an application made by an employer the Government could permit the wetting or cutting of wrapper leaves by female employees outside the beedi industrial premises. This would undoubtedly provide employment for certain *purdha* women who are unwilling to go to the factory, and the employer too will have the advantage of cheaper or competitive labour for it.

It is stated that one of the main objects of the legislation was to foster trade unionism amongst the beedi workers and that it could not be a proper purpose for a legislation. We do not consider that there is any substance in the objection. The legislation was necessitated by the evils in the contract system to which references have been made. It was found that there existed an exploitation of the workers by the contractors or the employers. It cannot be said that in the context in which the Act was passed, provisions which would enable trade unionism amongst the workers so as to invest the workers with a legitimate bargaining power with the employer, would be unreasonable.

Mr. Nambiar referred to us Natarajan's report to show that the Act would result in the imposition of pecuniary liability on small investors beyond their capacity. The report recommended that State aid should be given to small investors. That cannot mean that the industry cannot bear the financial burdens resulting from the observance of its provisions. State aid is not State subsidy. It cannot however follow that by reason of the Act the business would become uneconomical. That however is not relevant for the present purpose. It is stated that a number of manufacturers in Coimbatore district have issued notices of closure with a view to establish and to obtain their requirements from the neighbouring States. Whether such conduct on the part of the proprietors is the result of an anxiety to make their accustomed profit or one dictated by economic necessity or a part of a scheme to stage a demonstration against the legislation, it is unnecessary for us to enquire. There is no material placed before us to show that the legislation will have the effect of driving out the industry from the State.

The question as to the necessity of a legislation is entirely for the State to decide. Its constitutionality alone is before us. It cannot be said that merely because a beedi manufacturer may not be able to make the same extent of profit after the Act as before, is a ground for declaring the statute unconstitutional. Nor can it mean that he has a right to the continuance of the existing conditions of labour in the industry working in squalid surroundings, employing child labour and providing scope for the exploitation of the indigent and the weak members of society.

The proper approach to the question whether particular legislation which has the effect of depriving certain persons of their employment, is valid or not is laid down in *Mohd. Hanif Quareshi* v. *The State of Bihar*[1], thus :

> Clause (6) of Article 19 protects a law which imposes in the interest of the general public reasonable restrictions on the exercise of the right conferred by sub-clause (*g*) of clause (1) of Article 19. Quite obviously it is left to the Court, in case of dispute, to determine the reasonableness of the restrictions imposed by the law. In determining that question the Court, we conceive, cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. The right conferred by sub-clause (*g*) is expressed in general language and if there had been no qualifying provisions like clause (6), the right so conferred would have been an absolute one. To the person who has this right, any restriction will be irksome and may well be regarded as unreasonable. But the question cannot be decided on that basis. What the Court has to do is to consider whether the restrictions imposed are reasonable in the interest of the general public.

In that case the validity of a legislation on prohibiting cow slaughter was questioned. The effect of the legislation was to render a large number of butchers without employment. That did not however prevent the Supreme Court from pronouncing upon the validity of the legislation. Restrictions were imposed by the Madras Commercial Crops Market Act. This Court and on appeal the Supreme Court upheld the validity of that enactment (Vide *Kutti Keya* v. *State of Madras*[2], *Arunachala Nadar* v. *State of Madras*[3]).

Learned counsel for the petitioners urged that the impugned Act also offended against the fundamental right guaranteed by Article 19 (1) (*f*) ; the registered holder of a trade-mark could not purchase beedis manufactured by others without subjecting himself to the vicarious liabilities imposed by the Act on such a person as an employer. We have struck down section 2 (*g*) (i) of the Act as an unconstitutional restriction even of the fundamental right under Article 19 (1) (*g*). If that goes, the rest of the Act does not operate as an unconstitutional restriction of the freedom guaranteed by Article 19 (1) (*g*) and there is little basis for an indepndent attack on the validity of the Act based on Article 19 (1) (*f*) of the Constitution, *i.e.*, independent of the arguments we have considered and rejected in relation to Article 19 (1) (*g*).

The reasonableness of the restrictions imposed by the Act was impugned by reference to Article 43 of the Constitution which directs that the State shall endeavour to promote cottage industry on an individual or co-operative basis in rural areas. It was said that the legislation instead of fostering the cottage industry would really kill it. As we pointed out already except in the Mukkudal area, beedi making is not a subsidiary but a primary occupation for most of the employees. The features of a cottage industry are generally understood to be (i) indigenous products should be used in it, (ii) the worker should take to it as a subsidiary occupation, (iii) the worker is his own master investing his own though small capital; and (iv) it should be done in the home of the worker. It will be misnomer to call the beedi industry as a cottage industry as none except perhaps the last condition is present in it and is satisfied. Even that is absent where the branch manager collects less than twenty persons in a place and gets the work done. On the other hand the materials before the Legislature indicated that the industry satisfied all the criteria of sweated labour.

Objection was taken to the validity of section 40 which invests the Government with a power to exempt from all or any of the provisions of the Act or rules made thereunder any beedi industral premises, any beedi industry or any class of employees on the ground that it would enable the Government to act in a discriminatory manner. We are unable to accept the argument that an arbitrary power is given to the Government under that provision.

There is ample material to show that in regard to the beedi inustry in this State, there existed a state of affiairs which made it imperative for the Legislature to intervene in the interests of the public. It was necessary for the successful working of the enactment that certain restrictions should be imposed on individuals in regard to the

1. (1958) M.L.J. (Crl.) 727 : (1958) S.C.J. 975 : 1959 S.C.R. 629, 660.
2. (1954) 1 M.L.J. 117.
3. (1957) S.C.J. 297 : 1957 S.C.R. 370.

manner of doing business. We are of the opinion that except for the provisions of section 2 (*g*) (i), the restrictions and limitations imposed on the freedom of business are reasonably related to the object sought to be achieved by the Legislature in the interests and welfare of the public for dealing effectively with the evil which had, in course of years, become feature of beedi manufacture in the State. We are, therefore, of opinion that section 2 (*g*) (i) should be struck down as contravening the fundamental right guaranteed under Article 19 (1) (*g*) of the Constitution, but that the rest of the Madras Beedi Industrial Premises (Regulation of Conditions of Work) Act, 1958, is valid. A writ in appropriate form containing the above direction will issue. There will be no order as to costs.

R.M. ——— *Writ issued accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATADRI.

P. Chandriah Chetty and another .. *Appellants**

v.

Valchi Madhaviah Chetty and others .. *Respondents.*

Partnership—Partners—If entitled to interest on their capital—Interest on money overdrawn by a partner—When awarded.

It is now well-settled that it is not the practice of Courts to allow interest on moneys overdrawn by a partner from the partnership funds unless of course there is a clear agreement to that effect or there are special circumstances rendering it necessary that interest should be charged. Similarly where interest on capital is payable between the partners it stops running from the date of dissolution unless otherwise agreed. In order to entitle a partner to interest on moneys brought by him into the partnership business there must be (*a*) an express agreement to that effect ; or (*b*) practice of the said partnership ; a course of dealing between the partners usually shown from the partnership books or other facts and circumstances from which such an agreement may be implied ; or (*c*) any trade custom to that effect ; or (*d*) a statutory provision which entitles him to such interest (*e.g.*) section 13 (*d*) of the Partnership Act which recognises the right of a partner to charge interest on advances made by him as distinguished from the capital.

Appeal against the Decree of the City Civil Court at Madras in Original Suit No. 345 of 1944.

A. Durairaj, C. Vasudevan and *P. Venkataswamy*, for Appellant.

A. Sundaresan, G. Ramakrishna Ayyar and *P. Ramanujam Chetty*, for Respondents.

The Judgment of the Court was delivered by

Venkatadri, J.—This appeal is against the revised final decree passed by the First Assistant Judge, City Civil Court, Madras, in a suit for taking of accounts of a dissolved partnership. Some facts are necessary to show why there was a revised final decree in the City Civil Court, Madras.

Originally there was a partnership under the name and style of Messrs. Voora Sriramulu Chetti & Co. The partners of the said firm were three in number Voora Sriramulu Chetti, Valchi Madhaviah Chetti, the first defendant in the suit, and Voora Seetharama, who died on 26th April, 1943, leaving behind his widow who was added as the second defendant in the suit. Pending the suit she also died and defendants 4 to 6 were brought on record as her legal representatives. Voora Sriramulu Chetti had a share of five annas, the first defendant a share of nine annas and Seetharama Chetti a share of two annas in the rupee. Sriramulu Chetti died on 16th January, 1941. The plaintiffs as representing the estate of the late Voora Sriramulu Chetti filed the suit for taking of accounts of the partnership, which became dissolved on 31st March, 1941. A preliminary decree was passed on 20th March, 1945, for taking of accounts and in pursuance thereof a Commissioner was appointed and thereafter an auditor and after considering their reports a final decree was

* C.C.C.A. No. 50 of 1957. 13th December, 1960. (22nd Agrahayana, 1882, Saka).

passed on 14th April, 1949, directing the first defendant and the estate of the second defndant's husband in the hands of her executors defendants 4 to 6 to pay the plaintiffs a total sum of about Rs. 37,000 with interest thereon from 1st April, 1941, till realisation.

Defendants 4 and 5 preferred an appeal against the said preliminary decree. In the appeal the main point that was argued was about a debit entry of Rs. 28,000 against Voora Sriramulu Chetty found in the ledger of the firm for the year 1938-39. The plaintiffs attacked this entry as false and as having been fraudulently interpolated after the death of Voora Sriramulu Chetti. It was held that the debit was properly made and that the finding of the learned trial Judge that the debit entry of Rs.28,000 could not be true and that it was fraudulently interpolated after the death of Voora Sriramulu Chetti was not right. In the end, the appeal preferred by defendants 4 and 5 was allowed and the case was remanded to the trial Judge for passing a fresh final decree.

While remanding the matter to the City Civil Court, further directions were given that none of the partners will be entitled to or liable for interest in respect of the credits or debits before 1st April, 1939, but that, on and after that date, all the partners will be entitled to and liable for interest at 6 per cent. per annum in respect of the credits or debits. The appellate Court also gave a finding in regard to the stock of the firm valued at Rs. 2,180-1-6 that it would belong to the firm and not to any one of the partners of the firm and that this amount will be an item divisible among the partners according to their shares. The third matter was in regard to the omission to debit a sum of Rs. 4,000 odd against Voora Sriramulu which was directed to be taken into consideration at the time of the passing of the revised final decree.

In these circumstances, the above suit after remand came before the learned City Civil Judge, for passing a revised final decree. Once again the respective parties began to advance arguments and canvass the correctness of the accounts maintained by the first defendant and the reports of the Commissioner and the auditor. It was not open to the plaintiffs to attack the entries in the books of account as they themselves admitted in the plaint that the dispute was only in regard to the debit entry subsequent to the death of Voora Sriramulu. In effect the plaintiffs as the executors of the late Voora Sriramulu Chetti conceded that the accounts maintained by the first defendant were kept in the regular course of business, but they only disputed as an interpolation the debit entry after the death of Voora Sriramulu Chetti. In the prior appeal the finding was that the debit entry of Rs. 28,000 was not fraudulently interpolated after the death of Voora Sriramulu Chetti. The plaintiffs as the executors of the estate of the late Voora Sriramulu Chetti could not once again dispute the correctness of the debit entry of Rs. 28,000.

At the time of the passing of the final decree, the learned City Civil Judge had necessarily to take into consideration the debit entry of Rs. 28,000. Statement of the accounts of the respective partners were elaborately compiled by the learned counsel appearing for defendants 4 to 6 . Schedule A gives the amounts overdrawn by the respective partners up to 31st March, 1941. Schedule B gives the total assets available for division and the respective shares of the partners. Schedule C gives the particulars of the amount to be brought in by the plaintiffs for distribution amongst the other partners. It is common ground that the late Voora Sriramulu had advanced a sum of Rs. 50,000 as capital. But it is clear from the accounts and there is no dispute about it—that Sriramulu had not only drawn every pie of this amount by 14th November, 1937, but had overdrawn to the extent of Rs. 1,000. Now, as per the directions of the High Court, he had to be credited or debited with interest on the sums deposited or drawn out at the rate of 6 per cent. per annum. On the revised statement filed by the learned counsel for defendants 4 to 6, the learned Judge gave a finding that a sum of Rs. 23,238-5-0 was the total overdrawings of the late Voora Sriramulu Chetti up to 31st March, 1941, and that in regard to the total assets of the firm as on 1st April, 1941, the late Voora Sriramulu Chetti

will be entitled to a sum of Rs. 18,188-1-7. After adjusting the assets and liabilities of the late Voora Sriramulu Chetti, it was found that the plaintiffs representing the estate of Voora Sriramulu had to bring back to the firm for distribution among other partners a sum of Rs. 5,050-3-5.

It was not disputed that the plaintiffs received a sum of Rs. 9,964-12-3 on 12th August, 1942, before the institution of the suit. This sum was received by the plaintiffs from the defendants when they were called upon to pay to the estate of the said Voora Sriramulu Chetti, *i.e.*, monies due on account of capital, interest thereon and profits. Now as it is found that the executors of the late Voora Sriramulu Chetti have to bring back large sums of money to the dissolved firm, they should return this sum of Rs. 9,964-12-3. Thus, in all the plaintiffs executors of the late Voora Sriramulu Chetti were liable to bring back a total sum of Rs. 15,428-3-8 as on 13th August, 1942. This amount would be available for distribution among the other partners.

The learned City Civil Judge while passing the decree awarded interest at six per cent. on the principal sum of Rs. 15,428 from 12th August, 1942 upto the date of the passing of the final decree on 11th November, 1955. The interest comes to Rs. 11,932-2-7. The total sum thus found due and payable by the estate of the late Voora Sriramulu is about Rs. 27,360-6-3 and the plaintiffs were directed to bring back this sum and put it into the hands of the defendants so as to be available for the division among the other partners, defendants 4 and 5. We are not concerned in this appeal as to what the respective shares of the defendants 4 and 5 are in that amount.

It is under these circumstances the plaintiffs have filed the above appeal against the judgment and decree of the learned City Civil Judge. The main contention of the appellants in the appeal is that the learned City Civil Judge committed an error in allowing interest for the sums due and payable by the executors of the late Voora Sriramulu Chetti from 1942 up to the date of the passing of the final decree. The effect of the decree passed by the learned Judge is that the executors should pay a large amount of interest, *viz.*, about Rs. 11,932-2-7 from the date of dissolution of partnership up to the date of the passing of the final decree. The question that now arises for our consideration is whether the learned City Civil Judge is right in directing the plaintiffs to pay interest for any period subsequent to 12th August, 1942. The learned advocate for the plaintiffs Mr. K. Krishnaswami Ayyangar contended that the plaintiffs are not liable to pay interest subsequent to the dissolution of the partnership.

It is well settled that it is not the practice of Courts to allow interest on moneys overdrawn by a partner from partnership funds, unless of course there is a clear agreement to that effect or there are special circumstances rendering it necessary that interest should be charged. It is also equally well established that where interest on capital is payable between the partners it stops running from the date of dissolution unless otherwise agreed. So, in taking accounts of the partnership, interest after the date of dissolution will not generally be allowed to the partners on their respective capital, though interest was allowed by agreement during the partnership with annual rests. Learned counsel for the plaintiffs quoted the leading case on this point, viz., *Suleman* v. *Abdul Latif*,[1], where it was held by their Lordships of the Privy Council that interest in such a case will only be allowed from the date of the final decree and not from the date of dissolution or the filing of the suit. Lord Russel of Killowen delivering the judgment of the Board observed:

"This is not an action to recover some debt, of which it can be said that it was due at the date of the plaint. It is an action to dissolve and windup the affairs of a partnership ; and until the accounts have been taken, it is impossible to say what, if anything, is due from any partner to his co-partners. In their Lordships' opinion interest should only be allowed (there being no agreement to the contrary) to the plaintiffs from the date of the final decree by which the amount, if any, is found due from the defendants to the plaintiffs."

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1. (1930) 59 M.L.J. 121 : L.R.57 I.A. 245 : I.L.R. 58 Cal. 208 (P.C.).

Long before the judgment was delivered by the Privy Council, in *Umamaheswar Mudali* v. *Munuswami Mudali*[1], a Bench of this Court consisting of Coutts Trotter, C.J. and Viswanatha Sastri, J., held that it is not the practice to allow interest on money drawn by a partner from the partnership funds—be it capital or interest—unless it is so provided in the deed. They also observed that interest cannot be allowed on advances after dissolution of the partnership. Subsequently, in *Veeraswami* v. *Chetti Naidu*[2], Satyanarayana Rao, J., followed the decision in *Suleman* v. *Abdul Latif*[3], and held that in a suit for dissolution of an existing partnership and for accounts, the plaintiff is entitled to interest on the amount decreed only from the date of the final decree and not from the date of the plaint. All the above decisions were based on the principles laid down in some of the leading English cases and also by text-book writers.

In Halsbury's Laws of England, Vol. 28(Lord Simond's edition) in paragraph 1043 at page 538, it is stated :

"Except as provided by statute interest between partners is not allowed unless there is express stipulation, or particular course of dealing between partners as shown by the partnership books or a trade custom to the contrary. But the Court allows interest on the restitution of money from the firm which has been expended or withheld by a partner, and on secret profits made by a partner in breach of good faith towards his partners."

While laying this principle of law on this subject at the foot-note the decision in *Suleman* v. *Abdul Latif*[3], was referred to, and there is also reference to the two leading cases on this subject, viz., *Barfield* v. *Lough Borough*[4], and *Watney* v. *Wells*[5]. In *Barfield* v. *Lough Borough*[4], a similar question arose whether the partners are liable to pay interest after dissolution of partnership. At page, 7, Lord Selborne, L.C., observed :—

"For charging interest against either partner after the dissolution on sums not retained to his own use and not shown to have been received or employed otherwise than in the proper course of the realisation of the assets and liquidation of the concern, I see no ground."

In the second case *Watney* v. *Wells*[5], it was held that after the dissolution, interest was no longer payable under the document ; and that until division of the proceeds of the sale each partner would take what was found to be his share, of the capital at the time of the dissolution, with the accumulation thereof, and the residue must be equally divided between them. There is also another English case, *Viz.*, *Meymott* v. *Meymott*[6], referred by this Court in *Umamaheswara Mudaly* v. *Munuswami Mudali*[1]. In that case the Master of the Rolls said :—

"I do not see how I can give interest ; there is nothing to that effect in the partnership deed and I must introduce something into it before I can do so."

In Lindley on Partnership, 11th edition, page 478, under the marginal note "Interest on overdrawings and balance on hand", the learned author states :

"Except, however, where there has been a fraudulent retention or improper application of money, it is not the practice of Court to charge a partner with interest on money of the firm in his hands. For example, under ordinary circumstances a partner is not charged with interest on sums drawn out by him or advanced to him."

Even under our Indian Partnership Act, as a general rule interest on capital subscribed by partners is not allowed in taking accounts between them unless there is an agreement or trade custom to that effect. In such a case the fact that the bulk of the capital or all the capital necessary for the business was subscribed by one partner will not make any difference.

In order to entitle a person to interest on moneys brought by him into the partnership business, there must be (*a*) an express agreement to that effect, or (*b*) practice of the particular partnership ; a course of dealing between the partners (usually shown from the partnership books) or other facts and circumstances from which

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1. (1925) 50 M.L.J. 428.
2. (1947) 2 M.L.J. 450.
3. (1930) 59 M.L.J. 121 : L.R. 57 I.A. 245 : I.L.R. 58 Cal. 208 (P.C.).
4. L.R. (1872) 8 Ch. A. 1.
5. (1867) 2 Ch. A. 250.
6. (1862) 31 B.R. 445 : 54 E.R. 1211.

such an agreement may be implied ; or (*c*) any trade custom to that effect ; or (*d*) a statutory provision which entitles him to such interest ; such, for instance is the rule in clause (*d*) of section 13 of the Partnership Act which recognises the right of a partner to charge interest on advance made by him to the firm as distinguished from capital subscriptions.

Bearing all these principles in mind we have to consider whether the learned City Civil Judge is right in directing the plaintiffs to pay interest on the sums now found to be payable. Following the well established principles of the law of partnership in respect of interest payable on money overdrawn by partners and the practice of the Courts not to charge a partner with interest in respect of moneys overdrawn by him from partnership funds, or on the balance remaining in his hands we hold that a partner should not be made liable for interest on his overdrawings. Usually the Courts allow interest only under exceptional circumstances where there is an express or implied agreement to that effect or when a partner wrongfully withholds money of a partnership business and makes secret profits in breach of his duty to other partners, or where some partners have withdrawn money from partnership funds and have established other businesses with that money and have made large profits. In such cases, they are not only bound to account for the profits made in the other businesses but are chargeable with interest on the money so withdrawn.

Here is a simple case of dissolution of partnership and claim for accounts. There is no partnership deed. There are no special circumstances rendering it necessary to charge interest. There is no evidence or allegation that there is an express or implied agreement to pay interest on the overdrawings. Under these circumstances, we hold that the learned City Civil Judge was not right in directing the plaintiffs to pay interest on the amounts now found due and payable by them to defendants 4 and 5 for the period prior to the final decree. We therefore modify the decree of the lower appellate Court and direct that the plaintiffs are liable in law to pay interest only from the date of the passing of the final decree, and not for the period prior to it.

Learned counsel for the appellants also contended that the plaintiffs should not be directed to return the sum of Rs. 9,964-12-3. This amount was received by the plaintiffs before the institution of the suit from defendants 4 and 5 when they were called upon to render accounts of the said partnership firm and pay to the estate of the said Voora Sriramulu Chetti the moneys due on account of capital, interest thereon and profits. Defendants 4 and 5, the surviving partners, looked into the accounts of the firm that were settled up to 31st March, 1941 and a cheque on the Central Bank for the said sum of Rs. 9,964-12-3 was sent to the plaintiffs along with the statement of account. But unfortunately, the plaintiffs representing the estate of the late Voora Sriramulu Chetti filed the present suit for taking an account of the moneys due to the estate of the said Voora Sriramulu from the firm of Voora Sriramulu Chetti & Co., which became dissolved on 31st March, 1941, and for passing a decree for the sum found due. When the matter came before the learned City Civil Judge for passing a final decree, it turned out that the plaintiffs had to bring back large sums of money including the above sum of Rs. 9,964-12-3. Naturally, they should return this amount and we see no reason why we should allow the plaintiffs to retain the said sum which the plaintiffs have admittedly received before the institution of the suit.

The appellants' learned counsel also raised another point, namely, that a declaration should be given that the plaintiffs are entitled to or liable for interest in respect of their credits or debits even before 1st April, 1939. In order to prove that they are entitled to interest even before 1939, they attempted to file some additional documents and referred to some of the admissions made by the defendants themselves that even before 1939 the partners were charging interest in respect of their credits and debits before 1939. We think that no useful purpose will be served in re-opening this matter, as this question was finally settled in the previous proceedings, namely, C.C.C.A. No. 11 of 1950, wherein it was held :

"None of the partners will be entitled to or liable for interest in respect of their credits or debits before 1st April, 1939. On and from that date, all the partners will be entitled to and liable for interest in respect of their credits and debits. Interest will be at 6 per cent. per annum.".

The matter having thus been finally settled, it is not proper for the plaintiffs to re-open the issue and once again claim interest before 1939. Therefore, we hold that the parties are not entitled to charge interest or be liable for interest before 1st April, 1939

In the result, we modify the decree of the lower Court and direct that the plaintiffs will be liable to pay interest only from the date of passing of the final decree in respect of the moneys now found due and payable by them to defendants 1 and 4 to 6.

The parties to bear their own costs. Court-fee will be paid at the time of the execution.

This appeal having been set down for being mentioned on this day, the Court made the following

ORDER.—The suit will go back to the Court below for the passing of a revised final decree in accordance with the judgment.

Decree modified.

R.M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Sayyed Ahmed Ali .. *Appellant**

v.

Bhageerathi Ammal and others .. .. *Respondents.*

Transfer of Property Act (IV of 1882), section 58 (c)—Mortgage by conditional sale or outright sale—Test.

To decide whether a transaction is a mortgage by conditional sale or an outright sale its true nature has got to be determined by the intention of the parties thereto as evidenced by the terms of the document. Where the terms of the document are clear no extrinsic evidence *de hors* the document is admissible. But in cases of ambiguity it may be permissible to ascertain the true intention by having regard to the surrounding circumstances under which the document came into existence and other declaration of intention made by the parties.

The recitals in the document that the vendee shall have the right to alienate the property even before the expiry of the stipulated period fixed for the re-sale and on the expiry of that period neither the vendor nor his heirs shall have any manner of right over the property would show that the transaction is an outright sale.

Bhaskar v. *Shrinarayan*, (1960) 1 M.L.J. (S.C.) 87 : (1960) S.C.J. 327 : (1960) 1 An. W.R. (S.C.), 87 followed.

Appeal against the Decree of the District Court of Kanyakumari at Nagercoil in Appeal Suit No. 525 of 1952 preferred against the Decree of the Court of the Principal District Munsif of Nagercoil in Original Suit No. 577 of 1950.

S. Chellaswamy and *P. K. Ramachandran*, for Appellant.

N. R. Sesha Aiyar, for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal raises the question whether the document dated 6th December, 1113 (Exhibit A) in the case is a mortgage by conditional sale or an outright sale with an option to re-purchase.

The circumstances under which this document came to be executed are not in dispute. The defendant in the suit O.S. No. 577 of 1950 on the file of the Principal District Munsif's Court, Nagercoil, obtained a decree against the plaintiff

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* S.A. No. 1191 of 1958.

15th September, 1960.
(24th Bhadra, 1882, Saka).

in O.S. No. 820 of 1112 on the file of the Additional District Munsif, Nagercoil, for recovery of a sum of money. The plaintiff in this suit made an application before the Debt Conciliation Board in C.A. No. 138 of 1113 for an amicable settlement of all his debts under the provisions of an enactment prevailing in Travancore. It appears, though there is no specific evidence on the point, that the Debt Conciliation Board brought about a settlement of the debt and in pursuance of an arrangement between the plaintiff and the defendant in consonance with the decision of the Board the plaintiff executed in favour of the defendant Exhibit A for a consideration of Rs. 1,025. The terms of this document will be referred to later. The plaintiff sought to recover possession of the properties comprised in Exhibit A on the ground that the transaction embodied in Exhibit A was really a mortgage, though ostensibly it took the form of a sale deed and that he is entitled to redeem that mortgage on payment of the sum of Rs. 1,025.. The defendant resisted the suit and contended that the apparent tenor of the document reflected the true intention of the parties to the transaction, that the transaction was one of outright sale, that the time fixed for recoveyance had expired, that the time was of the essence of the contract and that the suit was not maintainable.

At the trial of the suit before the learned District Munsif of Nagercoil two main issues were raised, the first relating to the nature of the transaction under Exhibit A and the other raising the question whether the suit is barred by *res judicata* in view of an earlier proceeding in O.P. No. 19 of 1118 on the file of the District Court, Nagercoil. The trial Court upheld the defendant's contention and non-suited the plaintiff. The plaintiff thereupon preferred an appeal, A.S. No. 525 of 1952 on the file of the District Court, Nagercoil. The learned District Judge confirmed the Judgment and Decree of the trial Court. This second appeal has therefore been preferred by the aggrieved plaintiff.

The learned District Judge held that the present suit was not barred by *res judicata* by reason of the prior proceeding in O.P. No. 19 of 1118. On the question whether the suit transaction was a mortgage or an outright sale, the learned District Judge held that it was a sale. The finding of the learned District Judge that the suit was not barred by *res judicata* has not been challenged before me by the learned counsel for the respondent. The only point that arises for consideration therefore is whether Exhibit A can be construed to be a mortgage by conditional sale or not.

I shall now set out the relevant terms of Exhibit A. The form of the transaction is that of a sale. But that is in no way inconsistent with its being construed as a mortgage by conditional sale. Though the provisions of the Transfer of Property Act do not in terms apply to the Travancore territory, the principles of that Act appear to have been uniformly adopted and followed. The definition of a mortgage by conditional sale as contained in the Transfer of Property Act shows that the form of the transaction is that of a sale. I therefore attach no importance to the nomenclature of the document Exhibit A. That there was a relationship of a debtor and a creditor between the parties to Exhibit A cannot be disputed. In fact the bulk of the consideration for the transaction was the discharge of the decree debt which formed the subject-matter of conciliation before the Debt Conciliation Board. This is a circumstance more in support of the transaction being a mortgage than its being on outright sale. The following clauses in Exhibit A are relevant :

> "But in case either myself or the person who may obtain right subsequently either under law or by way of transfer, pays the consideration amount of fourteen thousand three hundred and ninety-two and eleven-sixteenth fanams on or before the end of Karkitagam 1115 M.E. (June-July, 1940), you shall receive the said amount and surrender possession of the properties by executing and registering a sale deed at my cost without raising any dispute whatever. On the expiry of this period, neither myself nor my successors will have any manner of right over these properties as per the above stipulation. You shall have the right to alienate the properties before the expiry of the above stipulated period subject to the said stipulation. Similarly I shall also have the authority to transfer my right to purchase the property for 14,392-11-16 fanams as stipulated above. But this stipulation shall not stand in the way of your getting patta in your name by registering the thandapper."

The true nature of the transaction has got to be determined by the intention of the parties thereto as evidenced by the terms of the document. Where the terms of the document are clear no extrinsic evidence *de hors* the document is admissible. But in cases of ambiguity it may be permissible to ascertain the true intention by having regard to the surrounding circumstances under which the document came into existence and other declaration of intention made by the parties. In the recent decision of the Supreme Court in *Bhaskar* v. *Shrinarayan*[1], this position has been clearly laid down.

In my judgment there are certain clinching circumstances in the terms of Exhibit A which would establish beyond all doubt that the true nature of the transaction was that of an outright sale. There is a recital in the document which states that the vendee shall have the right to alienate the properties even before the expiry of the stipulated period. This shows that title to the properties passed from the vendor to the vendee *eo instanti* on the execution of the document. If it were to be a transaction by way of a mortgage, there cannot be passing of title from the mortgagor to the mortgagee except the transfer of a bundle of rights consisting in a mortgage as defind under the law. Secondly there is a significant clause stating that on the expiry of the period fixed under the document neither the vendor nor his heirs shall have any manner of right over these properties. This clause emphasises the fact not merely that the option for reconveyance has got to be exercised within the stipulated period, time being of the essence of the contract, but after the expiry of the said period the option holder shall have no manner of right at all to the properties. This is hardly consistent with the right of a mortgagor if the transaction were to be treated as one by way of mortgage. There is also the clause that the vendee shall be entitled to have his name registered in the thandapper. I am not inclined to attach much importance to this aspect of the matter, as it may be that even in a mortgage by conditional sale with a view to facilitate the payment of kist such a transfer might be brought about. I am of opinion that on the clear language of the instrument, Exhibit A should be construed as being one of an outright sale.

Mr. Chellaswami, the learned counsel for the appellant, contended that an essential criterion to determine the true nature of the transaction would be the market value of the properties as on the date of the transaction. The learned District Judge has discussed this aspect of the matter and in his view the consideration mentioned in Exhibit A cannot be said to be such as to enable the Court to consider the transaction as being one of a mortgagee. It is true that if regard can be had to Exhibit D the extract from the settlement register, the value of the properties would be much more than the sum of Rs. 1,025 stated to be the consideration under Exhibit A-1. But unfortunately it is not known on what date the settlement came into existence. It may be that Sri Chellaswami the learned counsel is right when he submitted that it was long before the suit transaction. But I cannot say that the finding of fact arrived at by the lower appellate Court on this question of valuation is such as to call for interference in second appeal by this Court. I uphold the finding of the Court below that Exhibit A is an outright sale. In the result the appeal fails and is dismissed with costs.

No leave.

V.S. *Appeal dismissed. Leave refused.*

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1. (1960) S.C.J. 327 : (1960) 1 M.L.J. (S.C.) 87 : (1960) 1 An.W.R. (S.C.) 87 : A.I.R. 1960 S.C. 301.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JAGADISAN.

L. G. Lakshmana Iyer and others .. *Appellants**

v.

Messrs. S. Pachiappa Mudaliar, a firm of cloth merchants by partner, S. P. Gopalakrishnan .. *Respondent.*

Sale of Goods Act (III of 1930), section 39 (1)—Delivery of the goods to the carrier for transmission to the buyer—Railway receipt in respect of the goods endorsed in favour of the buyers and sent to them—Property in the goods passes to the buyer.

Where the seller takes the railway receipt in respect of the consigned goods in his name and endorses it in favour of the buyers and forwarded the same to them and also delivered the goods to the carrier railway for the purpose of transmission to the buyer, the property in the goods passed to the buyer and the buyer cannot hold the seller liable for the value of the missing goods.

Appeal against the Decree of the District Court of Salem in Appeal Suit No. 224 of 1957, preferred against the Decree of the Court of the District Munsif of Salem in Original Suit No. 13 of 1955.

K. Desikachari, for Appellant.

T. K. Subramania Pillai and *T. L. Radhakrishnan*, for Respondent.

The Court delivered the following

JUDGMENT.—The respondent in this second appeal sued to recover from the appellants a sum of Rs. 993-4-8 alleged to be due on account of dealings which appellants had with him from 4th February, 1953 to 5th July, 1954. As per the accounts of the respondent of Rs. 582-6-6 was stated to be due by way of principal and Rs. 410-14-2 as interest. The suit filed by the respondent was O.S. No. 13 of 1955 on the file of the District Munsif's Court, Salem. The plaintiff is a firm of registered partnership carrying on business in handloom cloth in Salem Town. Defendants 1 and 2 were also running a business in textiles and handloom cloth under the name and style of Mysore L. G. Lakshmanier and Varadier in Salem Town. It appears that the defendants had also a branch of their business at Mysore. Pending the suit the 2nd defendant died and defendants 4 to 6 were impleaded as his legal representatives. It is now common ground that a consignment of goods consisting of sarees of different varieties was made by the plaintiff at Salem booking the goods in the railway to be received by the defendants at Mysore. The plaintiff sent 149 pieces or items as disclosed by the invoice dated 30th September, 1953. On arrival of the goods at the destination, the defendants found that the parcel was in tampered state and therefore applied for "open delivery". In the "open delivery" so given, 70 pieces or items were found missing and a note to that effect was made in Exhibit B-7, original bill dated 30th September, 1953. The dispute between the parties is as to who should be responsible for the value of these missing pieces.

The learned District Munsif of Salem who tried the suit held that on the evidence on record the plaintiff was liable for the loss as the property in the goods consigned remained with him and did not pass to the defendants. In this view he granted a decree for a sum of Rs. 9-6-6 as balance of principal and interest due.

There was an appeal by the plaintiff before the learned District Judge of Salem in A.S. No. 224 of 1957. The learned District Judge differed from the view taken by the trial Court and held that the property in the goods passed to the defendants on consignment and delivery to the common carrier, namely, the railway, and that therefore the defendants alone should be made liable for the loss. Accordingly the decision of the trial Court was set aside and the plaintiff was granted a decree for an additional sum of Rs. 573 and costs. This second appeal has been preferred by the aggrieved defendants. The contention urged on their behalf is that the decision of the trial Court was right and that the decree of the trial Court should be restored.

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* S.A. No. 864 of 1958.

22nd September, 1960.
(31st Bhadra, 1882, Saka).

The short point for consideration is whether on the facts proved or admitted the property in the goods in respect of which the plaintiff made the consignment passed to the defendant by delivery to the carrier. The railway receipt was admittedly taken in the name of the consignor. This mode of booking is familiarly known as "self-booking." By itself such booking connotes the idea that the consignor intends to retain and does retain the property in himself. In such cases delivery to the carrier will not have the effect of passing property in the goods to the consignee. But in this case it is common ground that, after taking the railway receipt in his own name, the plaintiff endorsed it in favour of the defendants and forwarded the railway receipt to the defendants, who therefore were in a position to take delivery of the goods at the destination station without any further formality.

The decision relied upon by the trial Court in *Shamji Bhanji & Co.* v. *North Western Railway Co.*,[1] was rightly distinguished by the learned appellate Judge and I am of opinion that on the facts of the present case that decision cannot apply. Section 18 of the Sale of Goods Act provides that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. Section 19 of the Act provides that, where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. The learned District Judge has pointed out that, treating this contract as being one in respect of unascertained goods, the goods have been sufficiently ascertained and unconditionally appropriated to the contract by the very act of consignment and delivery to the carrier. Learned counsel for the appellants relied upon section 39, clause (2) of the Act. Section 39 (1) reads as follows :

"Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer."

Clause 2 is as follows :—

" Unless otherise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits to so do, and the goods are lost or damages in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages."

I am clearly of opinion that sub-clause (2) cannot apply in the present case. There was nothing in the nature of the goods or the other circumstances in the case to invoke the applicability of that clause. Therefore section 39 (1) will have full operation, which means that delivery of the goods to the carrier for the purpose of transmission to the buyer is really delivery of the goods to the buyer. The fact that the railway receipt contained a clause that the consignment was at the owner's risk is really equivocal. The question for consideration in this case is, who is the owner.

In this connection reference may be made to the decision of Wadsworth, J., in *Siddique & Company* v. *Mysore Textile Agencies.*[2] This decision has been referred to by the learned District Judge himself. It is pointed out in that case that where the consignment is booked in the name of the consignor himself, it would be necessary to endorse the railway receipt and deliver it to the buyer in order to complete the transaction. This has certainly been done in this case. I am of opinion that the learned District Judge came to the correct conclusion on the facts of this case that property in the goods passed to the defendants the moment the goods were entrusted to the carrier and the railway receipt was endorsed in favour of the defendants and forwarded to them.

The Second Appeal fails and is dismissed, but in the circumstances without costs.

V.S. — *Appeal dismissed.*

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1. A.I.R. 1947 Bom. 169.
2. 1947 M.W.N. 194.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Haji K. M. Abdul Kasim and another .. *Petitioners**

v.

P. M. N. Mohamed Dawood and others .. *Respondents.*

Muslim Wakfs Act (XXIX of 1954), *section* 55 (2)—*Suit relating to a wakf—Order of the Wakfs Board according or refusing sanction to file a suit—Order is an administrative one—Writ of* certiorari *will not lie.*

The consent or sanction accorded by the Wakf Board under section 55 (2) of the Act is only an administrative act of the Board and outside the purview of correction by the issue of a writ of *certiorari.*

In proceedings taken *suo motu*, where the Board comes to a conclusion that a suit should be filed or it should not be filed there can obviously be no lis and there is no determination of the rights, either the rights of the Board or the rights and liabilities of the wakf. If the Board considers on an application preferred to it that it should itself file a suit, the position would still be the same. There is no judicial determination of rights and liabilities of any person. If the Board comes to the conclusion that it is desirable to file a suit but that it need not file a suit itself, the Board could permit another to file the suit giving the requisite consent under section 55 (2) of the Act. The question would be one of expediency. The Board is under no statutory obligation to give the consent asked for under section 55 (2). In fact the Board is under no statutory obligation to file a suit or give its consent to another to file a suit.

Case-law discussed.

Petition under Article 226 of the Constitution of India praying that in the cir cumstances stated therein and in the affidavit filed therewith the High Court wil be pleased to issue a writ of *certiorari* calling for the records relating to the order in Proceedings No. 8555 of 1959, dated 27th February, 1960, on the file of the State Wakf Board, Madras, and quash the same.

V. Thyagarajan for *Messrs. M. Ramachandran* and *T. V. Baldakrishnan*, for Petitioners.

T. R. Srinivasa Iyengar, S. Parthasarathy, S. Rangaswami Iyengar, T. Krishnaswami Iyengar, M. A. Sathar Sayeed, for Respondents.

The Court made the following

ORDER :—The administration of the Annural Muhammadeeya, Madras Trust was governed by a Scheme sanctioned by the High Court by its decree dated 16th April, 1956, in A. S. No. 235 of 1952. The Scheme provided for six trustees. The three petitioners and respondents 8, 9 and 10 were the trustees appointed under the Scheme. The trust constituted a wakf now governed by the provisions of the Muslim Wakfs Act, 1954 (Act XXIX of 1954).

Respondents 1 to 7 sought and obtained the sanction of the Advocate-General under section 92, Civil Procedure Code, to file a suit to amend the Scheme now in force for the administration of the trust. That sanction was accorded on 9th December, 1959, after the Muslim Wakfs Act, 1954, to which I shall hereafter refer as the Act, came into force. Section 55 of the Act provided :

" (1) A suit to obtain any of the reliefs mentioned in section 14 of the Religious Endowments Act, 1863 (XX of 1863) and in section 92 of the Code of Civil Procedure, 1908 (Act V of 1908), relating to any wakf may, notwithstanding anything to the contrary contained in those Acts, bel instituted by the Board without obtaining the leave or consent referred to in those Acts.

(2) No suit to obtain any of the reliefs referred to in sub-section (1) relating to a wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board."

(Proviso omitted).

Respondents 1 to 7 therefore applied to the Board constituted under the Act, impleaded as the 11th respondent in these proceedings, for obtaining the consent prescribed by section 55 (2). The 8th respondent M.S. Abdul Majid, who was one of the trustees appointed under the Scheme was also a member of the Wakf Board

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* W.A. No. 187 of 1960.

25th August, 1960.
(2rd Bhadra, 1882—Saka).

Notice of the application prescented by respondents 1 to 7 under section 55 (2) of the Act was given to the trustees including the petitioners. It was the petitioners that opposed the grant of the sanction sought by respondents 1 to 7.

On 19th December, 1959, when the application preferred by respondents 1 to 7 under section 55 (2) of the Act came up before the Board, the eighth respondent, as a member of the Board, participated in the proceedings. But nothing was done that day except to adjourn the proceedings to 16th January, 1960, to enable the petitioners to file their counter-statement to the application preferred by respondents 1 to 7 The Board enquired into the petition on 16th January, 1960 and again on 30th January, 1960. In these proceedings the eighth respondent did not participate. The petitioner, however, alleged that the eighth respondent was present in the same room on the other side of a screen, and while he was there some of the members of the Board met and talked to him On 1st February, 1960, the petitioners challenged the validity of the proceedings before the Board on the plea that the eighth respondent who was one of the trustees had participated in the proceedings of the Board. On 27th February, 1960, the Board accorded the sanction sought by respondents 1 to 7 by a written order. The eighth respondent was not a party to that order It was signed only by the other nine members of the Board.

The petitioners applied under Article 226 of the Constitution for the issue of a writ of *certiorari* to set aside the order of the Board dated 27th February, 1960, giving the sanction sought under section 55 (2) of the Act by respondents 1 to 7.

The learned counsel for the petitioners challenged the validity of the sanction accorded by the Board on 27th February, 1960, on the following grounds. (1) The eighth respondent's participation in the proceedings invalidated the proceedings and the sanction. The Board violated the principle that no one should be a judge in his own case. It was *corannon judice*. (2) The second respondent's presence on the premises and in the same room on 16th January, 1960, 30th January, 1960 and 1st February, 1960, with the other members of the Board having access to him vitiated the ultimate decision of the Board. (3) The Board in giving sanction took into account what should be viewed as an irrelevant factor, the sanction already accorded by the Advocate-General under section 92, Civil Procedure Code.

In the view I propose to take it is not necessary for me to express any opinion on the soundness or otherwise of any of the three contentions I have mentioned above. The learned Counsel for the respondents contended that the application for the issue of a writ of *certiorari* was not maintainable at all because the consent or sanction accorded by the Board under section 55 (2) of the Act on 27th February, 1960, could only be viewed as an administrative act of the Board, outside the purview of correction by the issue of a writ of *certiorari*.

No decision directly bearing on section 55 (2) of the Act has been brought to my notice to determine the question, whether the consent of the Board prescribed by section 55 (2) is wholly administrative in its scope, or whether the Board acts as a judicial or a quasi-judicial Tribunal in deciding whether the sanction or consent sought under section 55 (2) should be accorded or not. Section 55 (2) of the Act is however analogous to some extent to section 92, Civil Procedure Code. There is no decision of this Court on the question, whether a sanction accorded by the Advocate-General under section 92, Civil Procedure Code, can be corrected in appropriate cases by the issue of a writ of *certiorari*. There is a conflict between the views taken by the other Courts.

In *Deendas* v. *Jagatram*[1], the Chief Judge of the Punjab Chief Court held that the sanction accorded by the Collector under section 539 of the Code of Civil Procedure of 1882, which has since been replaced by section 92, Civil Procedure Code of 1908, was an executive or administrative order and was outside the scope of the revisional jurisdiction exercised by the Chief Court.

1. 8 I.C. 1160.

In *Abu Backer* v. *Advocate-General, Travancore-Cochin State*[1], a Division Bench of the Travancore-Cochin High Court held that the decision which the Advocate-General arrived at under section 92, Civil Procedure Code, was a quasi-judicial in its scope and was capable of correction by the issue of a writ of *certiorari*.

The High Courts of Rajasthan and Allahabad took a contrary view and expressly dissented from the view taken in *Abu Backer* v. *Advocate-General, Travancore-Cochin State*[1]. In *Shrimalilal* v. *Advocate-General*[2], Wanchoo, C.J., after declining to accept as correct the view taken in *Abu Backer* v. *Advocate-General, Travancore-Cochin State*[1], observed :

> " All that is required is that the Advocate-General should be *prima facie* sarisfied that the case is of the nature mentioned in section 92 and then he can give his permission. It may also be mentioned that under section 92 the Advocate-General can file a suit himself or give permission to two or more persons to do so. Obviously this function of the Advocate-General cannot be called judicial or quasi-judicial function in the circumstances and there is no question of revising it under Article 227, or issuing a writ under Article 226, compelling him to do this, that or the other."

A similar view was taken by a Division Bench of the Allahabad High Court in *Shantanand* v. *Advocate-General*[3]. There was a more elaborate discussion of what constituted administrative or executive acts as distinct from judicial or quasi-judicial acts.

In *Pitchayya* v. *Venkatakrishnamacharlu*[4], the learned Judges observed at page 131 :

> " The object of requiring sanction or permission before such suits are instituted under section 92 is to safeguard not only the rights of the public but also the rights of the institution and the trustees. The suit being a representative suit, it is necessary to see to that the persons who come forward are persons who have an interest in the temple and persons who can be safely entrusted with the conduct of the suit. Even though the whole public are technically parties, still the plaintiffs who file the suit have the conduct of the suit and very large powers in the shaping and the conduct of the suit. As a matter of general experience, the public leave it to the plaintiffs to conduct all the proceedings and to take the various steps necessary for its successful prosecution. It is also for the benefit of the institution and of the trustees because it affords a safeguard against the impecunious improper persons coming as plaintiffs and involving the trust in litigation and expenses and it is also a safeguard that the persons are substantial persons from whom, if the suit fails, the costs can be recovered and not merely men of straw........The authority giving the sanction must consider the various aspects before giving the sanction and the one important consideration should be as regards the status and position of those who come forward to represent the community. We may in this connection state that it would be more desirable, before giving the sanction that notice should be given to the institution or the trustees although it is not obligatory."

It is in the light of these principles that I shall examine the scope of section 55 of the Act.

The scope of section 55 of the Act cannot obviously be decided with reference to what the Board did or purported to do in this case. It gave notice to the petitioners who contested the application preferred to the Board by respondents 1 to 7. The Board permitted counsel to represent the applicants and the respondents before it. Elaborate arguments were heard. Orders were reserved, and a reasoned order styled a judgment was given. Thus there were all the trappings of a *lis* and of a determination of this *lis* by the Board. But what happened in one case or in the case before me cannot determine the true scope of section 55 of the Act.

Section 55 (1) empowers the Board to file a suit, and it specifically dispenses with the need to obtain the sanction of the Advocate-General under section 92, Civil Procedure Code, or the need to obtain the sanction of the Court under Act XX of 1863. With reference to a wakf, the question whether a suit should be instituted to obtain any of the reliefs mentioned in section 92, Civil Procedure Code, could be taken up for consideration by the Board *suo motu* or on the matter being brought to its notice by any interested person. In either case the Board can decide whether it should file a suit or not. Even if one or more persons claiming to be

1. A.I.R. 1954 T.C. 331.
2. A.I.R. 1955 Raj. 166
3. A.I.R. 1955 All. 372.
4. A.I.R. 1930 Mad. 129.

interested in the proper administration of the wakf preferred an application to the Board for sanction to institute a suit, it is open to the Board to decide whether a suit should be instituted. After reaching that decision it is open to the Board to file a suit itself in exercise of the right conferred upon it to file such a suit; it is equally open to the Board to give them its consent under section 55 (2). It is equally open to the Board to decide that it is not in the interests of the wakf to file any suit at all. In that case no question of exercising the statutory right to file a suit under section 55 (1) could arise. The consent sought under section 55 (2) would have to be refused if the Board is convinced that no suit need be filed.

In proceedings taken *suo motu*, whether the Board comes to a conclusion that a suit should be filed or it should not be filed, there can obviously be no *lis*, and there is no determination of rights, either the rights of the Board or the rights and liabilities of the wakf. If the Board considers on an application preferred to it that it should itself file a suit, the position would still be the same. There is no judicial determination of rights and liabilities of any person. If the Board comes to the conclusion that it is desirable to file a suit but that it need not file a suit itself, the Board could permit another person to file the suit and given the requisite consent under section 55 (2) of the Act. In deciding whether it should itself file the suit in exercise of the right conferred upon it by section 55 (1) or give its consent to another under section 55 (2) the question would be one of expediency. The Board is under no statutory obligation to give the consent asked for under section 55 (2). In fact the Board is under no statutory obligation to file a suit or give its consent to another to file a suit.

It is against this scheme that I have to apply the test postulated by Atkin, L.J., in *King* v. *Electricity Commissioners*[1]:

> "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench division exercised in these Writs."

In deciding whether it should file a suit or not under section 55 (1) the Board is not invested with any legal authority to determine questions affecting the rights of subjects. Nor has it a duty to act judicially in arriving at a decision one way or the other. No doubt the discretion should be exercised on sound lines, but to a large extent it would be a question of expediency. Expediency would rather be even more into the decision of the question, whether the Board should itself file a suit or should permit another to file a suit under section 55 (2) of the Act. If the decision of the Board to file or not to file a suit, that is, to exercise or not to exercise a statutory right given to it by section 55 (1) of the Act is not equivalent to a judicial or quasi-judicial determination of rights, it is a little difficult to see how the decision to permit another to file a suit could be viewed as a decision determining questions affecting the rights of parties. No doubt, unless consent is given no suit can be filed. But neither the grant of consent nor the withholding of consent can really be said to affect the rights of parties, either of the applicant who seeks the consent, or of the wakf against whom it is intended to file a suit.

To put it in other words, if the decision reached by the Board either to file a suit or not to file a suit under section 55 (1) of the Act is not a judicial or quasi-judicial decision, it is a little difficult to see how the alternative open to the Board to sanction or withhold sanction to another person to file a suit becomes a judicial or quasi-judicial decision affecting the rights of parties. In arriving at a decision in none of the contingencies mentioned above is there any statutory obligation cast on the Board to act in a judicial or a quasi-judicial manner. Of course, there is a decision, but every decision is not necessarily judicial or quasi-judicial in its scope. Even administrative acts are based upon the decisions taken.

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1. L.R. (1924) 1 K.B. 171.

In my opinion the principle laid down by the Rajasthan and Allahabad High Courts should be extended to this case in preference to that laid down by the Travancore-Cochin High Court in *Abu Backer* v. *Advocate-General of Travancore-Cochin State*[1].

I uphold the preliminary objection and I hold that the decision of the Board is outside the purview of correction by the issue of a writ of *certiorari*.

I do not therefore propose to discuss the other questions at issue between the parties, neither the questions of law nor the disputed questions of fact. At one stage I thought of recording my views on these contentions also, but I have refrained from doing so, lest it should embarrass the determination of these issues, should they arise for determination in other proceedings, where the validity of the sanction given by the Board is put in issue.

The rule *nisi* is discharged and the petition is dismissed. No order as to costs.

V.S. —— *Rule* nisi *discharged and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P.V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASWAMI.

A.R. Varma and another .. *Appellants**

v.

The Mettur Industries Ltd., represented by Mr. W. Harpham, Chairman of the Board of Directors and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Labour Court or Tribunal—Scope of powers—If could go behind the Standing Orders and terms of contract.

When a dispute between a workman and his employer regarding the termination of his services has developed into an industrial dispute, the matter is no longer confined to the limits of contractual rights of parties. Having regard to the object of adjudication of industrial disputes it is inherent in the nature of things that a Labour Court or Tribunal should have jurisdiction to investigate and adjudicate upon the larger issues unfettered by considerations of contractual rights between the particular workman and the employer. Whether the dispute arises out of dismissal ffrm service on account of misconduct or termination of service simpliciter under the contract, if such termination is the subject-matter of an industrial dispute referred to for adjudication the tribunal will be well within its jurisdiction to deal with it in order to find out the propriety or otherwise of the order of termination of service irrespective of the fact that such termination was in conformity with the terms of the contract of service.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 2nd May, 1958 and made in (W.P. No. 110 of 1958)† petition presented to the High Court under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in I.D. No. 60 of 1957 and quash the award dated 30th December, 1957, of the 3rd respondent in so far as it relates to the 1st respondent.

S. Mohan Kumaramangalam and *B. Lakshminarayana Reddy*, for Appellant.

M.K. Nambiar instructed by *Messrs. King and Partridge*, and *T. Ramakrishna*, for the Additional Government Pleader (*M.M. Ismail*), for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—This is an appeal from the order of Balakrishna Ayyar, J., in W.P. No. 110 of 1958 quashing the award, dated 30th December, 1957, of the Labour Court, Coimbatore, in I.D. No. 60 of 1957 by which the Labour Court had directed the 1st respondent management to reinstate the 1st appellant before us in service.

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1. A.I.R. 1954 T.C. 331.

* W.A. No. 115 of 1959. 21st July, 1960. (30th Asadha, 1882, Saka).

† (1958) 2 M.L.J. 453 : (1958) M.L.J. (Crl.) 816.

The 1st appellant, who was an employee of the 1st respondent-company as a weaving production clerk and who had put in a service of about 11 years, was dismissed by the 1st respondent on 28th November, 1956, on the ground that he was found sleeping on three occasions while on duty on the night of 22nd November, 1956. As at that time an industrial dispute was pending adjudication by the Industrial Tribunal, now known as the Labour Court, at Coimbatore, the 1st respondent applied to that Tribunal under section 33 (2) of the Industrial Disputes Act for approval of the order of dismissal. At the same time, the 1st appellant also filed a complaint under section 33-A of the Act questioning the order of dismissal. The Labour Court which heard the two petitions together, by its award, dated 13th March, 1957, held that the order of dismissal was unjustified and, directing the reinstatement of the 1st appellant with full back wages and continuity of service, dismissed the 1st respondent's application filed under section 33 (2) of the Act. The award was published in the Fort St. George Gazette, dated 10th April, 1957 and had to be implemented by 9th May, 1957. It was however, not implemented until 13th July, 1957. In the meantime the 1st respondent sought the Special Leave of the Supreme Court to appeal against the award but leave was refused on 24th May, 1957. On 13th July, 1957, the 1st respondent reinstated the 1st appellant in service with effect from the forenoon. On the same day it terminated the 1st appellant's service with effect from the afternoon, the order of termination purporting to be one under the Standing Order 18 (*a*). We will presently refer to this order of termination in more detail. The order of termination of the 1st appellant's services became the subject-matter of an industrial dispute sponsored and supported by the 2nd appellant, the Union, which was eventually on 24th September, 1957, referred under section 10 (2) of the Industrial Disputes Act for adjudication by the Labour Court, Coimbatore.

At this stage, it will be convenient to refer to some more facts, which furnished a background for and had a bearing upon the order of termination dated 28th November, 1956. The 1st appellant, sometime before 26th March, 1955, had complained to the Salem District Textile Employees' Union that one Sadler, an officer in the employ of the 1st respondent, had abused him and insulted him when on duty. The Secretary of that Union took up that matter and addressed the manager of the 1st respondent by a letter dated 23rd June, 1955, of which copies were sent by him to the British High Commissioner, the British Trade High Commissioner, New Delhi, the Labour Minister, Union Government, New Delhi, the Chief Minister, the Labour Minister, Madras and others. This letter recounted the incident in which Sadler was alleged to have abused and insulted the 1st appellant and how he also used abusing words against him in December, 1954. The letter complained that such action and behaviour on the part of an European staff towards an Indian staff could not in the least be tolerated as it affected the self-respect of a man, leave alone his position, status, etc., and demanded, at the end, an apology in writing from the management with an assurance that there would be no recurrence of such an unhappy incident. What transpired thereafter is not clear from the materials on record. But on 28th November, 1956, just before the enquiry by the 1st respondent against the 1st appellant on a charge of sleeping while on duty on the night of 22nd November, 1956, commenced, the 1st appellant had handed to the enquiry officer his letter dated 28th November, 1956, which had reference to the question involving Sadler and the 1st appellant. In that letter, the 1st appellant stated that he was personally not for making much of that incident; and that but for the instigation of another European employee by name Nigli, neither he nor the Secretary of the Union would have developed the incident to such a magnitude as it had been, and addressed the letter, dated 26th March, 1955. The 1st appellant in that letter dated 28th November, 1956, expressed regret for having been a tool at the hands of Nigli and complained against Sadler, not knowing that Nigli had his own axes to grind against Sadler. The 1st respondent took no action against the 1st appellant on his letter, dated 28th November, 1956, until it was pressed into service on 13th July, 1957. It may be, remembered that on that day, the 1st appellant was reinstated in serive in the morning

and his services were terminated with effect from the afternoon by another order of the same date. The order terminating the serivces of the 1st appellant was as follows:

"In your letter dated 28th November, 1956, which you sent to the Manager on the same date, you have admitted that you falsely complained to the Union that Mr. Sadler, Shift Manager, grossly insulted and abused you on or about 24th March, 1955, at the instigation of Mr. Nigli, another member of the staff. The management is satisfied that your allegation against Mr. Nigli is without foundation.

Your complaint to the Union was communicated by the Union to several officials including the British High Commissioner unnecessarily and maliciously only with a view to harm the reputation of the company.

In view of this and your past conduct and in view of the strained relations between you and the company, the Management have lost confidence in you and consider that you are not a fit person to continue in the employment of the Mills.

Your service of employment is therefore terminated under Standing Order 18 (*a*) as and from this afternoon. You are also informed that the Management is prepared to pay you compensation equivalent to section 25-F of the Industrial Disputes Act."

It is common ground that no charges were framed and no enquiry was held against the 1st appellant and that he was not even given an opportunity to show cause against the reasons or the termination of his services. The 2nd appellant-Union, which espoused the cause of the 1st appellant, submitted to the Labour Court, to which the dispute in regard to the termination of the services of the 1st appellant had been referred for adjudication, that the 1st respondent would not respect the award of the Industrial Tribunal publi hed on 10th April, 1957, directing the reinstatement of the 1st appellant, that the Union thereupon moved the Government to prosecute the 1st respondent for non-implementation of the award, that it was after the Labour Officer, Salem, began to press the 1st respondent for the implementation of the award that it reinstated him with effect from 7 A.M. on 13th July, 1957, and that the reinstatement in the morning and the discharge of the 1st appellant from service in the afternoon with reference to a letter said to have been written by the 1st appellant about eight months earlier on which the 1st respondent had taken no action all the time, showed that the 1st respondent's conduct in discharging the 1st appellant was thoroughly *mala fide* and provided a glaring instance of the most intolerable type of unfair labour practice. Contending that the discharge of the 1st appellant was illegal, as it was not preceded by any charge, that no opportunity was given to him to explain the circumstances alleged against him and that it was, therefore, against the principles of natural justice, the Union prayed the Labour Court to direct the 1st appellant's reinstatement The position taken up by the 1st respondent before the Labour Court was that the termination of the services of the 1st appellant was in exercise of its power under the Standing Order 18 (*a*) under which the employment of any permanent workman might be terminated by 14 days' notice or by payment of 14 days' wages in lieu of notice and that no enquiry under that order was necessary, unlike in the case of a dismissal of a workman under the Standing Order 21 for misconduct. The 1st respondent also reiterated that the reason for terminating the 1st appellant's services was that in his letter dated 28th November, 1956, he admitted that he had falsely complained to the Union that Mr. Sadler, one of the Assistant Managers of the Mill, grossly insulted and abused him on or about the 24th March, 1955 and that the false complaint was made at the instigation of Mr. Nigli, that as the 1st appellant had been dismissed from service on 28th November, 1956, there was no necessity at that time for the management to take any action separately on his letter dated 28th November, 1956 and that the management, at no time, condoned the action of the 1st appellant in preferring the false complaint to the Union and was, therefore, entitled to consider the letter and take suitable action, when the dismissal of the 1st appellant was not upheld by the Courts. The 1st respondent further maintained before the Labour Court that its decision to terminate the services of the 1st appellant was, in the circumstances, *bona fide* and justified, as the management was satisfied that his retention in service would be prejudicial to its interests.

In an elaborate award dated 30th December, 1957, the Labour Court, while it was prepared to grant that under the Standing Order 18 (*a*) the 1st respondent possessed power to terminate the services of a workman by giving 14 days' notice or by payment of 14 days ' wages in lieu of notice, examined the reasons in the manage-

ment's letter dated 13th July, 1957, for the termination of the 1st appellant's services with a view to satisfy itself whether there had been an unfair labour practice or victimisation or whether the termination was vitiated by ulterior or improper motives or *mala fides* on the part of the management, and considered, in effect, that, as the termination of the 1st appellant's services was stated by the management to be based on the 1st appellant's past conduct and alleged false complaint, the 1st appellant should have been given an opportunity to show cause before adverse conclusions were drawn against him and that, in the circumstances, the course of conduct pursued by the management in terminating the services of the 1st appellant could not be regarded as fair to him. The Labour Court also observed that so far as the reference in the management's letter dated 13th July, 1957, to the 1st appellant's alleged past conduct was concerned, there was absolutely no evidence to support the allegation. In the opinion of the Labour Court, the termination of the 1st appellant's services, in the circumstances and the manner in which it was done, was unjustified and it, therefore, directed the 1st respondent to reinstate the 1st appellant in service.

Seeking to quash that award, the 1st respondent-management filed the writ petition out of which this appeal arises, under Article 226 of the Constitution for the issue of an appropriate writ. Balakrishna Ayyar, J., allowed the writ petition and quashed the award. The learned Judge did so in the view that the Labour Court erroneously thought that it too possessed a supervisory jurisdiction in a matter of this kind which related to the internal discipline of an industrial establishment in the hands of the management. The learned Judge considered that the 1st respondent was entitled, on the letters that passed, to take the view that it was undesirable in the interests of the 1st respondent to keep the 1st appellant in its employ any longer, that the 1st respondent had the necessary power under the Standing Order 18 (*a*) to dispense with the services of the 1st appellant by giving him the requisite notice or payment of specific wages in lieu of notice and that it was not within the power of the Labour Court to interfere with the impugned order terminating the services of the 1st appellant.

To quote the learned Judge :—

" In paragraph 16, the Labour Court quoted from a case[1], decided by the Labour Appellate Tribunal, this observation :

" The question, therefore, is whether this Tribunal in exercise of its supervisory jurisdiction, is entitled to know whether or not the conduct of the Manager was arbitrary."

The Labour Court whose award is now being challenged apparently thought that it too possessed a supervisory jurisdiction in matters of this kind. That view of it is manifestly erroneous. The Labour Court—and in fact the Labour Appellate Tribunal too—are the creatures of statute and they have no power or authority whatever except those conferred by the relevant statutes which have been passed from time to time. When a civil Court appoints a guardian for the person of a minor or a lunatic, or a Manager for the administration of his estate, the Court retains certain powers of control and supervision over the person it has so appointed. But the position of a Labour Court is no wise similar. Neither employees nor employers are in relation to the Labour Court, its wards. The internal discipline of an industrial establishment is in the hands of the Management and the Labour Court can interfere only where the statute permits to do so. It has no powers whatever except those which can be traced to a statute, statutory rule or a statutory instrument."

The learned Judge drew attention to the distinction between the termination of an employment simpliciter and termination of employment as a punishment for misconduct and considered that, as under the Standing Order applicable to the case, no enquiry was necessary in the case of termination of employment simpliciter, the 1st respondent acted within its powers in terminating the services of the 1st appellant without an enquiry, by recording its reasons in writing for the termination. The learned Judge was further of the opinion that there was no scope for the application of the principles of natural justice to a relationship of the kind where the rights of parties were provided for and determined by statutes, rules framed under the statutes and other statutory instruments, that the Labour Court ignored the rights which the management had under the Standing Orders and that the principles of natural justice could not be invoked to set aside something properly done in the exercise of a lawful power.

1. (1951) 2 L.L.J. 320.

In this appeal before us Sri Mohan Kumaramangalam, the learned counsel for the appellants, contended that the learned Judge was in error in taking a too narrow view of the nature and scope of the jurisdiction of the Labour Court in the matter and quashing its award on the ground that the 1st respondent was entitled in the exercise of its undoubted contractual power to terminate the services of the 1st appellant irrespective of other considerations. We are of the opinion that the learned counsel is right in his contentions. When a dispute between a workman and his employer regarding the termination of his services has developed into an industrial dispute, sponsored and supported by the concerned labour union, the matter is no longer confined to the limits of contractual rights but other considerations having a larger bearing upon industrial relations and industrial peace come into play. The principle of the industrial law in providng for adjudications of labour disputes is obviously to conserve and promote just and equitable relations between employers and employees and secure industrial peace through the process of collective bargaining, negotiation, conciliation or adjudication of such disputes. In our view, it is inherent in the nature of things, therefore, that settlement of such disputes is above the realm of merely adjudging contractual rights as between an individual employee and his employer with reference to particular terms and conditions of employment. An industrial dispute raised by a group of employees arrayed as a union, by reason of the collective force and exigencies of conserving equitable relations and industrial peace, opens up a wider field beyond individual contractual relations and may involve the question whether even though an action on the part of the management may be within the contractual power, it is an unfair labour practice, victimisation, *mala fide* or otherwise improper from the standpoint of just and equitable labour relationship. The jurisdiction of a Labour Court or an Industrial Tribunal to which such a dispute is referred for adjudication, should necessarily extend and include a power to investigate and adjudicate upon such questions, unfettered by consideration based on contractual rights as between a particular workman and his employer. It is here that the nature and scope of the jurisdiction of the Labour Court or the Industrial Tribunal adjudicating upon industrial disputes differ from those of the civil Courts, which can only decide strictly confining themselves to the contractual terms and conditions.

That such is the nature and wide scope of the jurisdiction of Industrial Tribunals has been long settled. The point was specifically decided by their Lordships of the Federal Court in *Western India Automobile Association* v. *The Industrial Tribunal, Bombay and others*[1]. The question in that case was whether an Industrial Tribunal had jurisdiction to order re-instatement of a dismissed employee of a non-Governmental industrial concern. The argument on behalf of the employer was that to invest the Tribunal with jurisdiction to order reinstatement amounted to giving it authority to make a contract between two persons and that such a power did not exist in any Tribunal. It was further argued that in the absence of express words, the Courts should not consider that the Tribunal had jurisdiction to order re-instatement on the ground that the power to do so was implied in the definition of an industrial dispute. Dealing with this argument, Mahajan, J., as his Lordship then was, delivering the judgment on behalf of the Court, observed :

"This argument overlooks the fact that when a dispute arises about the employment of a person at the instance of a trade union, or a trade union objects to the employement of a certain person, the definition of industrial dispute would cover both those cases. In each of those cases, although the employer may be unwilling to do so, there will be jurisdiction in the Tribunal to direct the employment or non-employment of the person by the employer. This is the same thing as making a contract of employment when the employer is unwilling to enter into such a contract with a particular person. Conversely, if a workman is unwilling to work under a particular employer a trade union may insist on his doing so and the dispute will be about the employment of workman by the employer and thus become an industrial dispute subject to the award of the Tribunal. Therefore if the bringing about of such relationship is within the jurisdiction of the Industrial Tribunal, because such disputes are covered by the definition of the expression 'industrial dispute' there appears no logical ground to exclude an award of reinstatement from its jurisdiction. It can equally direct in the case of dismissal that an employee shall have the relation of employment with the other party, although one of them is unwilling to have such relation."

1. (1949) 1 Lab. L.J. 245 : 194 .L.J. 154.

That no doubt was a case of dismissal of an employee. But it seems to us that in principle it makes no difference to the jurisdiction of the Industrial Tribunal whether it is a case of dismissal for misconduct or termination simpliciter of an employee's services. Both are cases of non-employment. If such a termination is the subject-matter of an industrial dispute referred to for adjudication, then the Tribunal will be well within its jurisdiction to deal with it in order to give or decline to give by its award the relief of reinstatement of an employee. In so dealing with the question of reinstatement, the jurisdiction of the Tribunal, in our opinion, is in no way limited or circumcribed by considerations based on contractual power permitting the employer to terminate an employee's services in terms of a particular contract or Standing Order governing the employment.

Though ostensibly the termination of an employee's services may be in conformity with the terms of employment or the relative Standing Order, it may, nevertheless, transpire on investigation into the relavant facts and circumstances surrounding and leading to the termination of service, that it is *mala fide* or is made with ulterior motives, or amounts to victimisation or an unfair labour practice or is arbitrary or is considered in any wise improper. With due respect, we are unable to agree with Balakrishna Ayyar, J., that an Industrial Tribunal will have no jurisdiction in such cases to investigate and if it thinks fit, direct reinstatement. The power of the Tribunal to find on the propriety or otherwise of an order of termination of the service of an employee is but incidental to its jurisdction to adjudicate on an industrial dispute and direct reinstatement.

In the recent case of *Assam Oil Co.* v. *Its workmen*[1], a certain employee's services were terminated by the management by giving one month's pay in lieu of notice. The employee's case was taken up by the workmen of the concern and the management having refused to reinstate the employee, it became the subject-matter of an industrial dispute which was referred to an Industrial Tribunal for adjudication. The Tribunal ordered reinstatement. In challenging that order, the argument on behalf of the management was that the management had terminated the services of the particular employee in pursuance of the terms of the contract and that an order of discharge passed strictly according to the terms of the contract, could not be questioned before the Industrial Tribunal. On behalf of the management, it was further argued that even if the order of dischrge was found to be unjustified because no enquiry was held, the whole evidence relating to the alleged misconduct of Miss Scott (the employee) had been led before the Tribunal and in the light of the said evidence, the order of discharge should not have been interfered with and reinstatement should not have been ordered. Repelling these contentions their Lordships of the Supreme Court held :

"If the contract gives the employer the power to terminate the services of the employee after a month's notice or subject to some other condition, it would be open to him to take recourse to the said term or condition and terminate the services of his employee ; but when the validity of such termination is challenged in industrial adjudication it would be competent to the Industrial Tribunal to enquire whether the impugned discharge has been effected in the *bona fide* exercise of the power conferred by the contract. If the discharge had been ordered by the employer in *bona fide* exercise of his power, then the Industrial Tribunal may not interfere with it; but the words used in the order of discharge and the form which it may have taken are not conclusive in the matter and the Industrial Tribunal would be entitled to go behind the words and the form and decision whether the discharge is a discharge simpliciter or not. If it appears that the purported exercise of the power to terminate the services of the employee was in fact the result of misconduct alleged against him, then the Tribunal will be justified in dealing with the dispute on the basis that despite its appearance to the contrary the order of discharge is in effect an order of dismissal. The exercise of the power in question to be valid must always be *bona fide*. If the *bona fide* of the said exercise of power are successfully challenged, then the Industrial Tribunal would be entitled to interfere with the order in question. It is in this context that the Industrial Tribunal must consider whether the discharge is *mala fide* or whether it amounts to vitimization or an unfair labour practice, or is so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motives and not in *bona fide* exercise of the power conferred by the contract."

In that case though the termination of service was couched in words which did not impute any misconduct to the employee, in substance it was found to be based on

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1. (1960) 1 L.L.J. 587: A.I.R. 1960 S.C. 1264.

misconduct and, therefore, considered as a punitive dismissal. Their Lordships observed that in such cases fair play and justice required that the employee should be given a chance to explain the allegations weighing in the mind of the employer, and upheld the jurisdiction of the Tribunal to make an enquiry with a view to see whether the employee should be directed to be reinstated in service. The Supreme Court was further pleased to observe :

> " Therefore, we are not prepared to accede to the argument urged before us by the learned Additional Solicitor-General that whenever the employer purports to determinate the services of his employee by virtue of the power conferred on him by the terms of contract, Industrial Tribunals cannot question its validity, propriety or legality."

Evidently realising this position, Sri M.K. Nambiar, the learned counsel for the 1st respondent, did not support the judgment of Balakrishna Ayyar, J., on the ground that the Industrial Tribunal had no jurisdiction at all to consider the validity, propriety or legality of order of discharge or termination of the 1st appellant from service. But the learned counsel contended that inasmuch as the Industrial Tribunal in this case did not find that the 1st respondent , in terminating the 1st appellant's service in the exercise of its contractual power, acted *mala fide*, the Tribunal exceeds its jurisdiction in directig the reinstatement only on the ground that the 1st respondent had failed to observe the principles of natural justice before passing the order of termination of the 1st appellant's services. The contention appears to us to be neither correct nor sound. In the first place, the jurisdiction of the Tribunal, as we have already held, includes within its ambit the power to order reinstatement. The basis of its jurisdiction is that an industrial dispute, which the Tribunal is called upon to adjudicate, comprehends within its definition a dispute as to the employment or non-employment of an employee. The foundation of its jurisdiction is not based upon its finding whether the order of discharge was *mala fide*. If the order was *mala fide*, that would be a proper ground on which the Tribunal might consider that the order of discharge should be set aside and the discharged employee directed to be reinstated. But, in our opinion, that is not the only ground on which the Tribunal can give the relief of reinstatement. In the second place, a perusal of the award leaves us with the impression that in the opinion of the Labour Court the order of discharge was not *bona fide*. It is true that it did not in so many words find that the order was *mala fide*. But it has stated enough to indicate that the order of discharge was not fair and proper. In fact Balakrishna Ayyar, J., recorded his impression on a reading of the award in the following words :

> " Though the Labour Court does not expressly record such a finding its observations in various paragraphs suggest that in its view the action of the Management in this particular case was not *bona fide*."

We are in entire agreement with the learned Judge that was the trend and tenor of the reasoning of the Labour Court in its award. There is, therefore, no substance in the above contentions of the learned counsel for the 1st respondent.

Sri M.K. Nambiar next contended that the Standing Order 18(*a*) was admittedly applicable to the case of the 1st appellant and that in so far as the order of termination of service was in confirmity with its terms and conditions, it could not be interfered with by the Tribunal. In support of his contention, the learned counsel referred us to the decision in *Nagpur Electric Co., Ltd.* v. *K. Shreepathirao*[1]. That was not a case of an industrial adjudication. There the order of discharge was straightaway challenged in the High Court of Nagpur on a petition under Article 226 of the Constitution for the issue of a writ of *certiorari* to quash that order. We fail to see how that case helps the 1st respondent in this case. As held by a Division Bench of this Court, to which one of us was a party, in *Working Journalists of 'Tamil Nadu'* v. *The Management of 'Tamil Nadu', Madurai*[2], there is nothing in the Industrial Employment (Standing Orders) Act (XX of 1946) or the rules or Standing Orders made thereunder which in any way affects the wide jurisdiction of the Industrial Tribunal to adjudicate upon industrial disputes involving the question of reinstatement of an employee in service and give effective relief in such cases.

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1. 14 F.J.R. 199.
2. (1959) 2 M.L.J. 318.

We, therefore, set aside the order of Balakrishna Ayyar, J., in W.P. No. 110 of 1958 and allow this appeal. The 1st respondent will pay the costs of the 1st appellant throughout. Counsel's fee Rs. 100.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESDNT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Eastern Bank Ltd. .. *Appellant**

v.

Sha Misrimal Bherajee, Merchants, 11-1, Narayana Mudali Street, Madras and others .. *Respondents.*

Shipping—Bill of lading—Construction—Description of goods—Failure to disclose defective packing—If renders bill "unclean"—Letter of credit authorising payment to seller against bill of lading—If 'justifies payment on bill other than clean bill—Liability of shipowner and paying bank for loss sustained by buyer.

A shipowner who, at the request of the seller, gives clean bills of lading with the knowledge that they would be negotiated, while as a matter of fact only unclean bills of lading should have been given, is guilty of a breach of duty and must be held liable for the loss occasioned thereby to the buyer

C.C.A. Nos. 52 and 53 of 1957, followed.

If a letter of credit authorises payment against bills of lading, such payment should be made only against clean bills of lading. Even though a letter of credit does not, on its terms, preclude a payment against an unclean bill of lading, the recognised practice is to interpret the letter as authorising payment only against clean bills of lading. The practice is so universal and so well understood by the commercial community, as to justify a technical meaning being given to the words "bill of lading" (except where there are express words indicating a contrary intention) in a letter of credit as a clean bill of lading.

Halsbury's Laws of England (Simond's edition), Vol. 2, page 218; Banker's Commercial Credit, by Gutteridge, 2nd edition, page 65 ; *Bank of Egypt* v. *Hannevig's Bank*, (1919) 1 Lloyds Rep. 69 and 77 ; *Rayner* v. *Hambros Bank*, L.R. (1943) 1 K.B. 37 and *British Imex Industries* v. *Midland Bank*, (1958) 1 All E.R. 264, referred to.

Appeals against the decree of the City Civil Court, Madras, in Original Suit No. 1134 of 1955.

O. T. G. Nambiar instructed by *King & Partridge*, for Appellant.

V. Thiagarajan, M. A. Rajagopalan, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal arises out of the decree in O.S. No. 1134 of 1955, which was instituted on the Original Side of this Court as C. S. No. 130 of 1952 and later transferred for disposal to the City Civil Court, Madras. The suit was tried along with O.S. Nos. 1135 and 1144 of 1955. The facts, which give rise to the claim in the suit, are similar to those in those two suits, except that the terms of the letters of credit in the case are different from those in the other suits. The appellant, who was the plaintiff in the suit (to be referred to as the buyer) entered into three contracts with the British Mercantile Co., New York (to be referred to as the seller) for the purchase of fresh Monsanto Polysterene Injection moulding powder (not reground) for an approximate value of Rs. 36,250, the quantity, price and the manner of its payment being specified in the contracts. In pursuance of the three contracts, the buyer opened two letters of credit, Exhibits B-1, and B-2, with the Eastern Bank, Ltd., Madras, the first respondent, (which will be referred to as the Bank) for 7,625 dollars. The Bank had no branch of its own at New York, and they intimated the Marine Midland Trust Company of New York under Exhibits B-28 and B-29 to open letters of credit for payment of the bills that might be presented by the seller. In

* C.C.C.A. Nos. 61 and 54 of 1957.

3rd November, 1960.
(12th Kartika, 1882, Saka).

purported performance of the contract, the seller delivered to the Ellermen and Bucknull Steamship Company (to be referred to as the shipowner) certain consignments in re-used fibre drums. The mate's receipt given to the shipper on the arrival of the goods at the wharf for being carried by S.S. " City of Lucknow " described them as being packed in "re-used drums." At the request of the seller the ship owner, after taking a letter of indemnity to cover against any loss for non-mention of the word "re-used " in relation to the drums, issued clean bills of lading, stating that the goods were received in apparent good order and condition in drums, without in any way qualifying the same. The bills of lading were promptly negotiated by the seller with the Marine Midland Trust Co., New York ; he obtained a payment of 6998. 75 dollars under the letters of credit. The bills of lading were, in due course, forwarded to the Eastern Bank, Ltd., Madras, who notified their arrival to the buyer; the latter paid into the bank the sum of Rs. 33,749-14-6 under protest (he having become wiser as to the contents of the consignment by reason of previous experience), took the bills and obtained delivery of the goods. The goods were found to contain only coal dust and factory shavings as before. In the action against the shipper in the American Courts, the buyer realised a sum of Rs. 9,988-15-0 before the date of the present suit. There has also been a receipt of a further sum of Rs. 3,615-10-6 subsequent thereto. The suit, of which this appeal arises, was instituted by the buyer for recovery of a sum of Rs. 23,760-15-6 against the Bank as well as the ship owner. The claim against the Bank was based on the footing, that what were presented to them by the seller were unclean bills of lading which they had no authority to negotiate and pay, and that, at any rate, no payment should have been made under Exhibit B-2, the second letter of credit, as the bills of lading, presented as they were on the last day fixed for performance of the contract, did not comprise the entire quantity contracted for. The case against the ship owner was the same as in the other two cases, namely, that there was a misrepresentation, or breach of duty on its part in not disclosing in the bills of lading that the goods were packed in " re-used drums " which, if done, would have prevented the seller from obtaining any moneys under the letters of credit. Both the bank as well as the ship owner contested the suits, the former stating that the documents accepted were in conformity with the terms of the letters of credit, and the latter repudiating its liability to the buyer. The learned trial Judge rejected the case, that the bills of lading presented to the bank were not clean bills ; he held that the bank would be acting within its authority in negotiating them. There was, however, an infirmity in regard to the payment under one of the two letters of credit, *viz.*, Exhibit B-2. The learned Judge held that the bank was in error in accepting the shipping documents which related only to a part of the goods contracted for and paying the moneys, when they must have known that the buyer was entitled to reject the goods when they arrived at Madras for the reason that the quantity contracted for had not been supplied within the time stipulated. He, therefore, held that the bank was liable to refund the amount paid under the letter of credit, Exhibit B-2. He apportioned the total loss sustained by the buyer, between Exhibits B-1 and B-2, and, after giving credit for the amounts received after the suit, passed a decree against the bank for a sum of Rs. 8,436. The suit against the ship owner was dismissed for the reason that, even if it had mentioned in the bills of lading that the goods were packed in re-used drums, thereby making the bills unclean ones, the banks would nevertheless have paid the amounts, as the terms of Exhibits B-1 and B-2 were couched in such a wide language as to authorise payment regardless of the fact whether the bills were clean or unclean.

The buyer has filed C.C.C.A. No. 61 of 1957, praying for a decree for the full amount of the claim against the shipping company, and also for the balance of the amount against the bank. The Bank has filed C.C.C. A. No. 54 of 1957, against the decree which directed them to pay the sum of Rs. 8,436 to the buyer.

The learned counsel for the parties submitted that it would be convenient to dispose of first the liabilities of the ship owner, leaving the liability of the bank to be determined after that has been ascertained. We, therefore, proceeded to consider C.C.C.A.No. 61 of 1957 in so far as the claim against the ship owner, the 2nd respondent, is concerned.

In the judgment delivered just now in the connected appeals C.C.C.A. Nos. 52 and 53 of 1957, we have discussed the liabilitity of a ship owner in regard to representations made in bills of lading. It is unnecessary to advert to that matter again. As we indicated earlier there is one important feature which distinguishes this case from the other two appeals, namely, the terms of the letters, of credit. For the ressons which we have given in the judgment in the other appeals, it must be held that the ship owner, with the knowledge that the bills of lading would be negotiated, gave at the request of the seller clean bills of lading, while as a matter of fact only unclean bills of lading should have been given. What remains to be considered then is whether the loss sustained by the seller (*sic*) was the direct result of the shipowner's conduct or would have occurred independent of it. The shipowner's case is that, having regard to the comprehensive terms of the credit, loss would have occurred even if it had granted unclean bills, It is necessary. therefore, to consider whether that is so.

Exhibit B-1 is typical of the two letters of credit opened by the buyer with the Eastern Bank, Ltd. The material portion of the letter is as follows :

> " We hereby authorise and request you and/or your Agents and/or Representatives at New York to open a confirmed and irrevocable bank credit in favour of Messrs. British Mercantile Company, Limited, etc., and to make payment or payments thereunder on our behalf...........against documents purporting to be invoices, shipping specifications, bills of lading and Policies and/or Certificates of Insurance covering Marine and War Risks. We agree that this credit is subject to U.S.A. regulations and practice.
>
> You and/or your agents and/or representatives are not to be responsible in any way for the genuineness, regularity or accuracy of such documents if apparently in order...........
>
> It is understood that this agreement and all question arising thereunder are to be construed according to English Law."

It will be seen that the terms of the letter of credit do not expressly stipulate that payment thereunder should be made only on presentation of clean bills of lading.

As stated earlier, in pursuance of Exhibits B-1 and B-2, the Bank opened in it turn irrevocable letters of credit with the Marine Midland Trust Company of New York. Exhibits B-28 and B-29 are the two letters of credit opened by the Eastern Bank, Ltd., with the Bank at New York. Exhibit B-28, which can be taken as an example, proceeded to set out the purport of Exhibit B-1. Clause 3 therein described the nature of the shipping document on which payment could be made that stated :

> " Clean " On Board " Bills of Lading in complete sets of at least two signed copies to be made out to the order of the Eastern Bank, Ltd., or to order blank endorsed and marked by the shipping company " Freight Paid "."

Thus, whatever might be the meaning to be attached to or the effect of the letter of credit opened by the buyer with the bank at Madras, the latter, acting in pursuance of the authority of the constituent, opened letters of credit with the New York banker, expressly stipulating that the payment should be made only against clean bills of lading. The learned counsel for the appellant contended that it was the duty of the shipowner to have issued a bill of lading with a recital that the drums used for packing were re-used drums, and that its failure to do so, in the cirumstances of this case, enabled the seller to obtain monies from the bank at New York which he would not have otherwise got. In support of that contention, it was urged that it was really immaterial whether the terms of Exhibit B-1 and Exhibit B-2 did not specifically restrict payment only against clean bills of lading, as, according to the learned counsel, whenever a credit note authorised payment against bills of lading, it must be read as authorising payment against clean bills of lading. In other words, even though a letter of credit did not, on its terms, preclude a payment against an unclean bill of lading, the recognised practice was to interpret the letter as authorising payment only against clean bills of lading. It is said that the practice is so universal and so well understood by the commercial community as to justify a technical meaning being given to the words " bill of lading " (except where there are express words indicating a contrary intention) in a letter of credit as a clean bill of lading. In our opinion, the contention appears to be well founded.

In Halsbury's Laws of England, (Simonds Edition), Volume 2, at page 218, it is stated that the bills of lading "must be clean unless the credit authorises the acceptance of bills which are not."

In the Law of Banker's Commercial Credits by Gutteridge, 2nd Edition, it is stated at page 65 :—

"In the absence of any instructions in the banker's mandate the documents must be such as are usual in the trade in question, and which the customer could in his turn require a sub-purchaser to accept in satisfaction of a contract of resale. To use the words of Lord Sumner in *Hansson* v. *Hamel & Horley, Ltd.*[1] 'The documents have to be handed by banks; they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry ; they have to be such as can be re-tendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce." Or, as has been said, the documents must be in merchantable order."

Commenting on the above extract, note (*g*) in the same page stated :

" It was apparently on this ground that it was suggested by Scrutton, L.J., that where a credit calls for the tender of bills of lading it is implied that 'clean' bills of lading are meant : *National Bank of Egypt* v. *Hannevig's Bank*[2]."

Again, at page 77 :

" There is no doubt that it is the universal practice today to decline bills of lading which are not clean except where the banker has authority to accept uncleans bills or where he feels justified in taking the risk. A banker cannot be expected to know what bills of lading are used in particular trades (of *Rayner* v. *Hambro's Bank*[3], and it is submitted that even where a bill is usual in the trade a paying banker would be entitled to reject a 'dirty' bill, unless he had authority to accept it—in other words, a ' dirty ' bill cannot normally be in the contemplation of the buyer for, save in abnormal circumstances, a buyer would prefer to have documents declined by his banker's correspondent than have the trouble of suing his supplier for breach of contract, at any rate where the bill of lading disclosed what seemed to be a weakness in the goods or packing which might affect their value. And a banker is not in a position to judge of the seriousness of the " clasuing", certainly not to the extent of knowing whether the buyer would wish him to accept or refuse."

In *British Imex Industries* v. *Midland Bank*[4], the relevant agreement was a general one as in the instant case. It did not stipulate that a credit was available only against presentation of clean bills of lading. Salmon, J., observed at page 268:

" The letter of credit stipulated that payment would be made against bills of lading without qualification. The plaintiffs suggest that this does not necessarily mean clean bills of lading. In my judgment, when a credit calls for bills of lading, in normal circumstances it means clean bills of lading. I think that in normal circumstances the ordinary business man who undertakes to pay against the presentation of bills of lading means clean bills of lading ; and he would probably consider that that was so obvious to any other businessman that it was hardly necessary to state it. That seems to have been the view taken by Bailhache, J. in *National Bank of Egypt* v. *Hannevig's Bank, Ltd.*[2] I entirely agree with it. No doubt, as was pointed out by the Court of Appeal in that case (*Ibid.* at page 70), there may be circumstances when, for instance, business has been disorganised by war, in which a credit against bills of lading is not necessarily a credit against clean bills of lading. That is a point which it is unnecessary to decide in this case, for in this case there are no special circumstances, and I read " bills of lading " in the letter of credit as meaning clean bills of lading. '"

The argument of Mr. O.T.G. Nambiar for the shipowner was not so much as to say that that was not the practice of the banks, but that under the usage recognised in commerce the use of the word " re-used " in the description of the packing material would not make the bill unclean. The learned counsel contended that, in the interpretation of Exhibits B-1 and B-2, the English Law and English commercial usage should not be looked into, as the document itself stated that the credit was subject to U.S.A. regulations and practice. This, according to learned counsel, imported the American commercial practice contained in Exhibit B-27, namely, " Uniform Customs and Practice for Commercial Documentary credit " issued by the International Chamber of Commerce, clause 18 of Exhibit B-27, which we noticed in the other appeals, stated that a bill would not be deemed to be unclean merely because the word " re-used " is used with reference to a package. The learned trial Judge has given reasons why the " Uniform Customs and Practice " should not be adopted in the present case. We agree with him. For one thing Exhibit B-27 came into existence in 1951, later than the date of the suit documents ;

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1. L.R. (1922) 2 A.C. 36.
2. (1919) 1 Lloyds Rep. 69.
3. L.R. (1943) 1 K.B. 37.
4. (1958) 1 All E.R. 264.

there is no evidence about the earlier commercial practice. We have adverted in our judgment in the connected appeals to the fact, that the practice set out in Exhibit B-27 was merely recommended for adoption. The letter of credit in the instant case specifically states that all questions arising thereunder are to be construed according to English Law. In our opinion, if the words "re-used drums" had been used in the bills of lading with reference to the packages received on board, the bills would have been unclean ones.

The authorities, to which we have referred above, show that, if a letter of credit authorises payment against bills of lading, such payment should be made only against clean bills of lading. This view is confirmed by the fact, that the bank itself understood Exhibit B-1 only in that sense. The bank, while opening the credit with its agent at New York in pursuance of Exhibit B-1, executed Exhibit B-28. That document specifically stipulated that payment by the New York banker should be only against clean bills of lading. Mr. Barker, the accountant of the Eastern Bank Ltd., while giving evidence, stated :

"We wrote to our agents the details of the credit in our letter copy Exhibits B-28 and 29."

He also stated that the rules contained in Exhibit B-27 were recommendations, and had not been circulated to the banker's constitutents. It is clear from the evidence that Exhibit B-1 was interpreted or understood by the parties as authorising payment only against clean bills of lading, and this is consistent with the law and practice stated above. Indeed, there is no evidence in this case that the clause was ever interpreted otherwise.

On behalf of the shipowner, it was contended that this plea was not taken in the plaint, and that, therefore, it should not be allowed to be taken in appeal. A reading of paragraph 6 (*f*) of the plaint and paragraph 13 of the written statement would make it clear that what the parties contemplated was only negotiation of clean bills of lading. The correspondence between the parties also shows that the parties themselves construed the authority to the bank under Exhibits B-1 and B-2 as warranting payment on presentation of clean bills of lading. In Exhibit B-18, a letter written by the buyer to the shipowner's agent, it was specifically stated that the banker of New York had been instructed to accept only clean bills of lading. There is no denial of that statement in the reply, Exhibit A-25. Again, in Exhibit B-24, the notice issued by the buyer to the shipowner, it was reiterated that, if the shipowner had correctly stated that there was defective packing in re-used drums, that factor alone would have been sufficient to entitle the banker to refuse to negotiate all the drafts. There was no denial of this in the shipowner's reply, Exhibit A-25. It must, therefore, be taken as proved that on the terms of Exhibits B-1 and B-2, the bank could only have paid on presentation of clean bills of lading.

The learned counsel for the shipowner contended that, notwithstanding the practice referred to above, a bank could not be said to be acting in excess of its authority, if it interpreted a letter of credit according to its tenor. We cannot, however, accept the contention, in the view we have taken, namely, Exhibits B-1 and B-2, understood in accordance with the usage in commerce, would entitle the bank to pay only against clean bills of lading. It follows that the failure of the shipping company to disclose the fact that the drums used were re-used drums, and had enabled the seller to obtain monies under credit, and that it should, therefore, be held liable for the loss.

This conclusion can be reached by another line of reasoning as well. Assuming that Exhibits B-1 and B-2 authorised payment against even unclean bills of lading, what the Eastern Bank, Ltd., did was to open letters of credit in terms of Exhibits B-28 and B-29 with the intermediary or paying banker, namely, the Marine Midland Trust Co. of New York. The authority of the bank at New York was limited by the terms of Exhibits B-28 and B-29. Those documents admittedly did not authorise negotiation of unclean bills of lading. Therefore, the New York Bank would not have paid if the shipowner had issued bills of lading making a correct representation of facts. The damage sustained by the buyer by reason of the payment by the American bank would, therefore, be directly attributable to the default of the shipowner.

The learned City Civil Judge declined to hold the shipping company liable on the ground that, even if the concerned bills of lading had described the drums as re-used drums, the banker would have been within his rights in paying the amount to the shipper. This is obviously incorrect, having regard to the terms of Exhibits B-28 and B-29 which do not authorise payment against unclean bills of lading.

Learned counsel for the shipowner then argued thus : the authority of the banker in the instant case would have to be decided only on the basis of Exhibits B-1 and B-2 and not on the terms of Exhibits B-28 and B-29, as there was no privity of contract between the bank at New York and the buyer. If the bank at New York had paid in excess of authority conferred on it under Exhibits B-28 and B-29, it was entirely a matter between itself and its principal, namely, the Eastern Bank, Ltd., which could ratify the acts of its agent done in excess of authority: the buyer could have no legitimate grievance except when the terms of Exhibits B-1 and B-2 were contravened.

We cannot agree with this contention. If the question arose between the Eastern Bank, Ltd., and the constituent, it may be (we are not to be understood as deciding the point) that the former could plead that its liability to the latter should be decided on the terms of Exhibits B-1 and B-2. That is not the case here. The point for consideration is whether the ship owner's breach of his duty or a fraudulent misrepresentation by it in a document of title, has directly resulted in a loss to the buyer. In the proved circumstances of the case, it is clear that the New York bank would not have paid against unclean bills of lading. One cannot assume for this purpose that the paying bank at New York will not act upto the terms of Exhibits B-28, and B-29, and proceed to pay the seller in excess of its own authority. There is a causal connection between the default of the shipowner and the loss, and this would be sufficient to sustain the claim of the buyer for damages against the shipowner. We are, therefore, unable to agree with the conclusion arrived at by the learned Judge that his loss was not the direct result, of the omission on the part of the shipowner to issue unclean bills of lading.

The result is that the appellant would be entitled to a decree against the shipping company for the sum of Rs. 20,145-5-0 with subsequent interest and costs here and in the Court below. The appeal, in so far as it relates to the Eastern Bank, Ltd., will be adjourned to 3rd November, 1960.

C.C.C.A. Nos. 54 and 61 of 1957 and C.C.C.A. Nos. 59 and 60 of 1957 coming on for hearing on this day, the Court delivered the following

JUDGMENT:—

C.C.C. A. Nos. 59 *and* 60 *of* 1957.—These appeals are withdrawn. In the circumstances we consider that no order need be made in regard to the costs in the appeals. These appeals are dismissed as withdrawn.

C.C.C.A. Nos. 54 *and* 61 *of* 1957.—Mr. V. Thyagarajan represents that the appeal preferred by the Eastern Bank (C.C.C. A. No. 54 of 1957) may be allowed and that the decree passed by the lower Court against the Eastern Bank may be vacated. The position is that the plaintiff having succeeded in obtaining a decree against the Shipping Company is virtually giving up the claim against the Bank. It is in these circumstances that we direct that C.C.C.A. No. 54 of 1957 be allowed and that the decree of the Lower Court in so far as it directed the appellant, the Eastern Bank, to pay the plaintiff do stand vacated. There will be no order as to costs, in C.C.C. A. No. 54 of 1957.

In C.C.C.A. No. 61 of 1957 the claim was against both the shipping Company and against the Bank. The claim against the Shipping Company has been allowed by our judgment. Mr. V. Thyagarajan, learned counsel for plaintiff-appellant represents that the plaintiff is no longer pressing the claim against the Bank. The appeal against the bank will stand dismissed. There will be no order as to costs in C.C.C.A. No. 61 of 1957.

P.R.N. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATADRI.

Meenakshi Ammal .. *Appellant**

v.

P. S. Muthukrishna Chettiar .. *Respondent.*

Practice—Courts granting relief—Events subsequent to the suit—When could be taken into consideration.

There could be no inflexible rule that in disposing of matters coming before it Courts should never take or should always take into consideration the subsequent events that have come into being after the institution of the proceedings and which were not available to it at any time earlier. It must depend upon the peculiar circumstances of each case. Where fresh evidence is required to substantiate the subsequent events and parties are not agreed on the basic allegations, it is not proper for a Court to take into account the subsequent events and mould the relief in accordance with them.

Appeal under clause 15 of the Letters Patent of the High Court against the Judgment and Decree of the Hon'ble Mr. Justice Ganapatia Pillai, dated 8th November, 1957 and passed in S.A. No. 16 of 1956 preferred against the decree of the District Court of South Arcot at Cuddalore in A.S. No. 310 of 1954 preferred against the decree of the Subordinate Judge of Cuddalore in O.S. No. 83 of 1953.

M. S. Venkatarama Ayyar and *K. Kalyanasundaram*, for Appellant.

P. S. Balakrishna Ayyar, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the Judgment of Ganapatia Pillai, in S.A. No. 16 of 1956. It arises out of a suit filed by the Appellant before us—O.S.No. 83 of 1953 in the Court of the Subordinate Judge of Cuddalore—for partition and separate possession of her half share in the suit properties and for past and future mesne profits. The appellant, who will be referred hereafter as the plaintiff, is the wife of the respondent-first defendant. She filed a suit O.S. No. 137 of 1950 in the same Court for separate maintenance. Though the suit was originally contested by the first defendant, when the suit was taken up for trial, he agreed that the plaintiff would be entitled to claim separate maintenance, but left for the decision of the Court the rate of maintenance and the properties, which are to be charged, for recovery of the maintenance. The learned Subordinate Judge fixed the rate of maintenance at Rs. 150 per month and also directed that the maintenance may be charged on the properties mentioned in a compromise the, terms of which were put before the Court and also on certain properties, which had been alienated by the first defendant. A deed of compromise was filed into Court with a prayer that a decree may be passed in terms thereof. Eventually a decree was passed on 21st December, 1951, the material part of which runs as follows :

" It appearing that the parties have agreed to compromise the matter of the suit and that they have filed into Court a deed of compromise praying that this Court will pass a decree in terms thereof this Court doth in pursuance of the said deed of compromise, order and decree among other terms contained in the compromise set out below as follows :—

(1) That the maintenance payable by the first defendant to the plaintiff is fixed at Rs. 150 per mensem and the same shall be paid from 5th July, 1950, by the first defendant.

(2) That the properties mentioned in the compromise and also properties of the first defendant alienated to the various persons shall be a charge for the payment of the above maintenance. "

The terms of the compromise were embodied in the decree. They *inter alias* provided that the plaintiff and the first defendant should enjoy in common the lande set out in the schedule attached to the compromise towards the maintenance payable by the first defendant to the plaintiff and towards the maintenance of the

*L.P.A. No. 40 of 1958.

25th November, 1960.
(4th Agrahayana, 1882, Saka)

first defendant himself and that, if necessary, the plaintiff shall get her half share of the properties after partition, lease out and enjoy the income therefrom, that neither the plaintiff nor the first defendant shall have the right to alienate independently the properties during their lifetime and that if it became necessary, the properties could be alienated by both the plaintiff and the first defendant jointly consenting. It was further provided therein that the half share to which the first defendant was entitled and the half share to which the plaintiff was entitled for her maintenance should be taken after their lifetime by the heir or heirs of the first defendant. The suit out of which this appeal arises was filed for partition and separate possession of a half share of the suit properties, on the following allegations, after a reference to the material terms of the compromise. After the compromise decree, as there were several debts owing by the first defendant, which had to be discharged, both the plaintiff and the first defendant jointly made certain alienations for the purpose and the only items of lands that remained were the properties in the suit. As it was not possible for the plaintiff to live with the first defendant, she was living separately with her parents at Panruti. On 17th February, 1952, the second defendant, who is the elder brother of the first defendant purported to obtain a sale deed of the suit properties from the first defendant for an alleged consideration of Rs. 5,000. The sale is void and not binding on the plaintiff and she was entitled to ask for partition of the properties ignoring the sale. The first defendant remained *ex parte* and the suit was contested only by the second defendant, his brother. The main plea raised in his written statement was that the arrangement embodied in the terms of the compromise was a private arrangement beyond the scope of the suit and, as the compromise was not registered, it was of no effect and not enforceable and the plaintiff did not acquire any proprietary interest in the suit property. He, therefore, asserted that the sale in his favour was not liable to be set aside as void. The learned Subordinate Judge of Cuddalore decreed the suit so far as the relief of partition and separate possession was concerned and directed that the mesne profits could be inquired into under Order 20, rule 12 of the Code of Civil Procedure. The learned Judge held that the compromise did not require registration. The second defendant filed an appeal to the District Judge of South Arcot who confirmed the decision of the learned trial Judge. Before the learned District Judge the only point raised was whether the decree in O.S. No. 137 of 1950 was compulsorily registrable, and as it was not registered the same is not enforceable by the plaintiff. The learned District Judge agreed with the decision of the trial Court that the compromise did not require registration, because the properties comprised therein were the subject-matter of the suit and the case fell within the exemption under section 17(2) (*vi*) of the Registration Act. The second defendant thereupon filed a Second Appeal (No. 16 of 1956) to this Court. Subsequent to the filing of the Second Appeal, the 2nd defendant filed a petition (C.M.P. No. 6969 of 1956) praying that the suit may be dismissed on account of certain events, which were alleged to have happened. In the affidavit filed in support of this application it was alleged that subsequent to the filing of the Second Appeal, the plaintiff and the first defendant, *i.e.*, the wife and the husband, had resumed cohabitation as a result of which the plaintiff had conceived a child and consequently the compromise decree for maintenance obtained by the plaintiff became ineffective and nullified. In the counter-affidavit filed by the plaintiff, the wife, it was admitted that she was *enceinte* through her husband, but stated that this was the result of a casual union, which took place in her mother's house. She denied that she and her husband had been living together. There was a reply affidavit filed by the second defendant asserting that the husband was spending considerable time in the company of his wife. Ganapatia Pillai, J., took up the above objection first and came to the conclusion that by reason of the resumption of cohabitation by the plaintiff and the first defendant, the very basis of the decree in O.S. No. 137 of 1950 had ceased to exist and in that view he allowed the Second Appeal and dismissed the suit, without dealing with the question which had been raised to in the original memorandum of Second Appeal. The learned Judge, however, granted to the plaintiff leave to appeal in pursuance of which she has filed the present Letters Patent Appeal.

It was admitted by learned counsel for the respondent that the point, which he sought to raise in and by C.M.P. No. 6969 of 1956 was not available to him either at the time of the institution of the suit, nor even subsequently till after the filing of the Second Appeal. He contended that nevertheless this Court could take notice of subsequent events, which had happened and decide the case, having regard to such events. It is obvious that there is no invariable or inflexible rule that subsequent events should never be taken into consideration or that they should always be taken into consideration. Each case must depend upon the peculiar circumstances present in the particular case. The question is whether, in the case before us, the subsequent events should be considered by this Court in disposing of the Second Appeal. Ganapatia Pillai, J., evidently thought they could be. With respect to the learned Judge, we are of a different opinion. We shall give briefly the reasons, which have impelled us to come to this conclusion.

The plea raised by the second defendant in the petition C.M.P. No. 6969 of 1956 is based upon the ruling of this Court in *Venkayya* v. *Raghavamma*[1], which was followed and applied in two decisions of two learned Judges of this Court by Krishnaswami Nayudu, J., in *Perundevi Ammal* v. *Amavasikan*[2], and by Basheer Ahmed Sayeed, J., in S.A. No. 305 of 1949. It appears to us that much can be said on both sides regarding the applicability of the rule laid down in *Venkayya* v. *Raghavamma*[1], to the facts of the present case. If the rule is that a decree for separate maintenance passed in favour of a Hindu wife ceased to be effective once the wife goes and lives with her husband because the very basis of the decree has disappeared, *viz.*, the living apart by the wife on justifiable grounds, then the question will arise in this case whether the plaintiff has gone back to live with her husband. It is not clear to us if a decree for separate maintenance would automatically be extinguished by the mere fact that after the decree the husband and the wife have sexual intercourse, though the wife continues to live apart from the husband. The term " cohabitation " has been used in several of the decisions dealing with the subject, but it is a matter for argument what exactly is meant by cohabitation in so far as it is material for the application of the rule. We refer to this aspect because on the affidavit it does not appear-and certainly it is not admitted —that the plaintiff and the first defendant are living together and that she is being maintained by her husband. On the other hand, her allegation is that she continues to live with her parents and the first defendant is living with his brother, the second defendant, separately. In this view, it may be necessary to determine the question of fact whether the wife has gone back to her husband. To decide that question it may be necessary to take evidence. Ganapatia Pillai, J., appears to have thought that once it was admitted that there was a conception and subsequently a child birth, it necessarily followed that the plaintiff was living with her husband.

Then there is also the question whether this rule laid down in *Venkayya* v. *Raghavamma*[1], which itself was based on English Matrimonial Law would apply to the case of a consent decree like the decree, which is the foundation of the plaintiff's claim in this suit. There was no adjudication by the Court that there were valid grounds, which would justify the wife living away from her husband. The suit was really not contested so far as the liability was concerned. The terms of the compromise which were embodied in the decree, are also peculiar. Mr. M. S. Venkatrama Iyer, learned counsel for the appellant, described the compromise as a family settlement. It is not necessary for us to say whether, in law, it can be said to be such. Suffice it to say that there are these and other questions of fact and law, which will have to be decided before the rule in *Venkayya* v. *Raghavamma*[1], is applied to this case. In these circumstances we are convinced that this is not a case in which the Court should take into account subsequent events and mould the relief in accordance with them. Whether the second defendant would be entitled to any relief in other proceedings, it is not for us to say now. If he has any right, any decision in the

1. (1941) 2 M.L.J. 263 : I.L.R. (1942) Mad. 24.
2. (1952) 2 M.L.J. 610.

Second Appeal would not by itself adversely affect such right. We think that it is just and equitable that the Second Appeal should be heard on its original memorandum of appeal. As the learned Judge, Ganapatia Pillai, J., considered it unnecessary to deal with the merits of the case, in view of his finding that the suit should be dismissed on account of subsequent cohabitation, the second appeal should be remanded for disposal without reference to subsequent events.

We allow the above appeal, set aside the judgment and decree of Ganapatia Pillai, J., in S.A. No. 16 of 1956 and direct that it be restored to file and heard and disposed of in accordance with law. The appellant will get the costs of this Letters Patent Appeal from the respondent. The costs of the Second Appeal will abide the result. The appellant will be entitled to a refund of the Court-fee paid on the memorandum of the Letters Patent Appeal.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Ellerman & Bucknall Steamship Co., Ltd. through the Agents, Messrs. Best & Co., Ltd., Madras .. *Appellant**

v.

Sha Bhagajee Sonmull and others .. *Respondents.*

Shipping—Bill of lading—Nature and incidents of—Clean bill—What is—Shipper and shipowner—Duty of—Sale and purchase of goods under C.I.F. Contract—Payment to seller by means of letter of credit—Seller obtaining bill of lading suppressing defects in packing with fraudulent intent—Shipowner issuing clean bill when unclean bill ought to be granted—Liability of—Loss sustained by buyer on account of false description in bill of lading—Bank paying on faith of bill of lading—Liability of—Right of buyer—Letter of credit—Origin, nature and incidents of—Duty of bank and seller—Tort—Deceit.

The first respondent entered into certain contracts with the British Mercantile Bank, New York, for the purchase of Fresh Monsento Polystyrene Injection Moulding Powder (not reground) in granules, packed in new fibre drums. The price was to be paid at New York by means of irrevocable letters of credit to be opened in favour of the seller, payable in full on presentation of the shipping documents. The buyer accordingly opened letters of credit with the Mercantile Bank of India, Ltd., (second respondent) for the requisite amounts. The second respondent had no branch at New York, of its own, but arranged with the Bank of Montreal at that place to open on behalf of the buyer the necessary letters of credit, the material portions of which were :

" Drafts are to be drawn at sight and accompanied by documents purporting to be full set, clean, freight paid, on board ocean bills of lading. . . . . . " I agree that for the regularity or genuineness of the above documents you are not to be responsible if they are apparently in order ".

Within the time stipulated in the contracts the seller tendered to the appellant (shipping company) for being carried by its steamer " S. S. City of Lucknow " certain consignments purporting to contain Polystyrene powder ; the goods were packed in re-used drums. The mate's receipt, which is a mere acknowledgment of the receipt of goods by the shipowner and which was given on delivery of the goods by the shipper to the shipowner, described the packages as "re-used drums". But the bills of lading which contained the contract of carriage merely mentioned the packages as " drums ", because the seller requested the appellant, the shipowner, to issue clean bills of lading by not mentioning therein that the goods were consigned in re-used drums, (as in the mate's receipt) the seller being apprehensive that the description of goods as packed in re-used drums in the bill of lading (as in the mate's receipt) would not facilitate his obtaining monies under the letters of credit. The appellant (shipowner) while acceding to the request of the seller safeguarded itself by obtaining from the shipper (seller) letters of indemnity wherein the seller agreed to indemnify the former against any loss, etc., that it might sustain by reason of clean bills of lading being issued, deleting the word " re-used " in the description of the drums. It was obvious that the shipowner would not have deleted these words except for the letter of indemnity, as in the opinion of the shipper as well as the shipowner the use of the word " re-used " would not make the bills of lading " clean " bills so as to enable the seller to negotiate them freely, as the bills would then be " unclean bills ". The relevant clauses in the bills of lading stated : " Received in apparent good order and condition from the British Mercantile Co., Ltd., to be transported by the good vessel City of Lucknow. . . . . Total packages said to weigh 9920 lbs. said to be marked and numbered as below " 21 drums, weighed 9920 lbs."

The seller, armed with such bills of lading, had no difficulty in negotiating them and drawing monies from the Montreal Bank under the various letters of credit. The Bank in due course forwarded

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* C.C.C.A. Nos. 52 and 53 of 1957. 21st October, 1960.
(29th Asvina, 1882—Saka).

the bills of lading to the 2nd respondent, Mercantile Bank, Ltd., Madras, who duly notified the buyer and the latter paid amounts and took delivery of the bills.

After the goods arrived in Madras, when the first consignment was opened it was found that the packages contained nothing like Polystyrene powder, but coal dust and factory shavings. The buyer made the later payments to the bank under protest and sued the Mercantile Bank and the shipowner (appellant) for the loss sustained by him (after realising certain amounts from the seller) alleging that the loss was attributable to the breach of duty committed by the defendants. The liability of the shipowner (appellant) was rested on the basis that it issued a clean bill of lading when the circumstances existing to its knowledge bound it to issue only an unclean one.

Held : (1) that when the appellant issued a clean bill of lading, not noting the defects in the description of packing as contained in the mate's receipt, it made a representation that the goods were received in apparent good order and condition while they were actually not so, and it could not be said that in those circumstances the shipowner actually and honestly believed the statements therein as truly representing the condition of packing, particularly in the context of the existing commercial practice and the indemnity it took covering itself against claims for the deletion of the word "*re-used*,"

(2) there could be no doubt that the misrepresentation was the direct cause of the loss sustained by the buyer ; if the shipowner had given an unclean bill of lading, the banker would not have paid, and even if he had, the buyer would not be bound by it in view of the terms of the letter of credit ;

(3) in view of the fact that the bill of lading was a document of title to goods which would pass by negotiation, the representations or misrepresentations therein should be held to have been made to every individual who would come by it as a holder thereof, and there was thus a breach of duty on the part of the shipowner and an actionable false representation, and

(4) the 1st respondent who suffered loss by reason of that misrepresentation was entitled to a decree for the amount of the loss.

Evolution of the system of payment by means of letters of credit and the main features thereof stated.

Cheshire and Fifoot's Law of Contracts, (1956 edition) page 366 ; Halsbury's Laws of England, Simonds' edition, Vol. 2, page 213, referred to.

A *clean* bill of lading is one that does not contain any reservation as to the apparent good order or condition of either the goods themselves or their packing. A defect in packing, if noted in a bill of lading, would render it an unclean bill.

British Imex Industries v. *Midland Bank*, (1958) 1 All.E.R. 264; *Armstrong* v. *Allan Brothers*, 67 L.T. 417, referred to.

Law of Bankers' Commercial Credits, 2nd edition by Gutteridge, pages 77 and 79 ; *Silver* v. *Ocean Steamship Co., Ltd.*, L.R. (1930) 1 K.B. 416 and Brown Jenkinson *v. Percy Dalton (London) Ltd.*, L.R. (1957) 2 Q.B. 621, referred to.

Semble.—A banker in whose favour a letter of credit is opened owes a duty to his constituent to act strictly in accordance with the terms thereof. Where a beneficiary presents shipping documents and demands monies under a letter of credit, it is the duty of the bank to scrutinise the documents tendered and see whether the instructions given by its constituent have been strictly complied with, and the bank would be bound to refuse to accept or negotiate the shipping documents or pay the beneficiaries under the letter of credit, unless the documents presented strictly conform to those covered by the instructions. Where the terms of letters of credit authorise payments on presentation of a clean bill, it would be the duty of a seller under a C.I.F. Contract to present a clean bill. If circumstances are such that in respect of goods consigned by him he would be entitled only to an unclean bill of lading, he should not draw monies thereon. If, in those circumstances, he procures a clean bill of lading (knowing that he is not entitled to it) and obtains money under the credit note, he would undoubtedly be guilty of deceit. A shipowner who, with knowledge of the intention of the shipper, gives a clean bill of lading where the condition of the consignment was such that no clean bill could be given, would be equally guilty of deceit.

Appeals against the decrees of the City Civil Court of Madras in Original Suit Nos. 1135 and 1144 of 1955 respectively.

O. T. G. Nambiar instructed by Messrs King and Partridge, for Appellant.

V. Tyagarajan, M. A. Rajagopalan, V. Rajagopalachari and *S. Ramiah* , for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—These appeals raise a question as to the liability of a shipowner for non-disclosure in the bill of lading of a fact relating to the condition of the packages received by him for carriage by sea. The Ellerman and Bucknall Steamship Co., Ltd., whose local agents are Messrs. Best & Co., Ltd. are the appellants in the two appeals, which arise out of the decrees in two actions, O.S.

Nos. 1135 and 1144 of 1955 (commenced on the original side of this Court but later transferred to the City Civil Court, Madras). The suits were instituted by the 1st respondent in each of the appeals for recovery of Rs. 26,061-4-9 and Rs. 23,248 respectively from the Mercantile Bank of India (the second Respondent) and the appellant. They were tried with a similar suit, O.S. No. 1134 of 1955, and a common judgment was delivered. The first respondent in C.C.C.A. No. 52 of 1957 entered into two contracts respectively, dated 12th December, 1950 and 19th January, 1951, with the British Mercantile Co., New York, for the purchase of Fresh Monsento Polystyrene Injection Moulding Powder (not reground) in granules packed in new fibre drums for Rs. 25,000 and Rs. 12,000. The 1st respondent in C.C.C. A. No. 53 of 1957 entered into 3 similar contracts with the same seller on 12th December, 1950, 23rd January, 1951 and 25th January, 1951, for Rs. 13,500, Rs. 13,500 and Rs. 7,300 respectively. In all the contracts the price was to be paid at New York by means of irrevocable letters of credit, to be opened in favour of the seller, payable in full on presentation of the shipping documents. In accordance with the terms stipulated, the buyers opened letters of credit with the Mercantile Bank of India Ltd. for the requisite amounts. The Mercantile Bank of India, which had no branch of its own at New York, arranged with the Bank of Montreal at that place to open on behalf of the buyer, the letters of credit. Within the time stipulated in the contract, the seller tendered to the appellant, for being carried by its Steamer "*S. S. City of Lucknow*" certain consignments alleged to contain Polystyrene powder : the goods consigned were packed in re-used drums. The mate's receipt, which was given on delivery of the goods by the shipper to the shipowner, described the packages as "reused drums", It may be noticed that the mate's receipt is a mere acknowledgment of the receipt of goods by the shipowner : the contract of carriage will be contained only in the bill of lading signed by the person who agrees to carry them ; that is a document of title to the goods.

The seller, being evidently apprehensive that the description of the packages in the mate's receipt, if entered in the bills of lading, would not facilitate his obtaining monies under the letters of credit, requested the appellant, the shipowner, to issue clean bills of lading by not mentioning therein that the goods were consigned in re-used drums (as in the mate's receipt), but merely mentioning them as drums. The appellant acceded to the request but it safeguarded itself by obtaining from the shipper letters of indemnity (Exhibit A-26 being typical of the rest), whereby the seller agreed to indemnify the former against any loss, etc., that it may sustain by reason of clean bills of lading being issued, and issued such bills, the relevant clauses therein stating :

> " Received in apparent good order and condition from the British Mercantile Co., Ltd., to be transported by the good vessel *City of Lucknow*.
>
> * * * * * *
>
> Total packages said to weigh 9920 lbs. said to be marked and numbered as below.
>
> " 21 drums weighed 9920 lbs."

(The above is contained in exhibit A-7, one of the bills of lading issued by the appellant).

Armed with such bills of lading, which did not disclose that the packing was either defective or was made in re-used drums, the shipper had no difficulty in negotiating them and drawing monies, 5227 dollars and 2475 dollars from the Montreal Bank under the various letters of credit. In due course, that Bank forwarded the bills of lading to the Mercantile Bank Ltd., Madras, who duly notified the buyer. The latter paid Rs. 37,033-12-9 and Rs. 33,012-5-0 on various dates, and took delivery of the bills. The goods arrived in Madras on 13th April, 1951. When the first consignment was opened, it was found that it did not contain anything like Polystyrene powder, but coal dust and factory shavings. As the fraud of the seller was found out even at the beginning, the later payments to the bank were made by the buyer under protest. The contents of the other consignment were in no way different.

The buyers, thereupon, commenced actions against the seller in the American Courts, and were able to realise Rs. 10,972-8-0 and Rs. 9,764-4-0 respectively in respect of the contracts forming the subject-matter of the two appeals.

The buyers then instituted the two suits, out of which these appeals arise, for recovery of the balance (Rs. 26,061-4-9) and Rs. 23,248-8-0 representing the loss sustained by them against the Mercantile Bank Ltd., and the shipowner, stating that the loss sustained by them was attributable to the breach of duty committed by them. Subsequent to the institution of the suits, the respective buyers received from the seller Rs. 3,981-14-0 and Rs. 3,654-12-0 and due credit was given by the lower Court for these sums. According to the buyer, what was presented to the Bank at New York were unclean bills of lading (it is unnecessary to refer to the circumstances relied on in support of that plea) and the bank had no authority to negotiate and pay under the terms of the various letters of credit. It was, therefore, claimed that the bank should be held liable to make good the loss sustained by the buyer. The case against the shipowner was that the bills of lading issued were clean bills, which the banks were authorised to negotiate. It was stated that the shipowner, with the knowledge that the goods were defectively packed or that the packing was such that if described correctly, it would not entitle the seller to clean bills of leading, issued such bills which enabled the latter to operate on the letters of credit, which, otherwise, would not be possible ; alternatively, it was said that the shipowner was guilty of not disclosing the true description of the condition of the package received for carriage, but on the contrary, making a statement in the bills of lading, as if they were received in apparent good order and condition (while they were really not so), thus making false representations which resulted in a loss to the buyer, the ultimate assignee of the bills.

The claim of the buyer was contested by the bank as well as the shipowner. The former pleaded that they acted in strict conformity with the letters of credit, the seller having presented clean bills of lading, on production of which they were bound to pay. The latter denied that it ever failed to disclose the true facts to any one to whom they owed a duty to make such disclosure, that the containers of the goods were sufficiently and rightly described as drums, and that, as the materials sent by the consignor had been duly delivered, as received on board the ship, it had no further responsibility in the matter.

The learned City Civil Judge did not accept the contention of the buyer that the bills of lading tendered to the bank were unclean bills ; he held that the bank had committed no breach of duty by negotiating such bills and paying the seller the amounts under the letters of credit, and that the claim against it should fail. But, as regards the shipowner, he found that it did not correctly describe the goods in the bills of lading, but instead deliberately described them as drums, with a view to facilitate the buyer to operate on the letters of credit, and that, if the correct description had been given, the bills of lading would have turned out to be unclean bills of lading, and the bank would not have paid the drafts drawn by the buyer. On that conclusion decrees against the shipowner followed. Credit was given for the payments subsequently received by the buyer from the seller, and decrees were passed against the appellant in the two suits for Rs. 22,079-6-9 and Rs. 19,693-4-0. The shipowner has filed C.C.C.A. Nos. 52 and 53 of 1957 against the aforesaid decrees. The buyer (the plaintiff) has filed C.C.C.A. Nos. 60 and 59 of 1957 against the dismissal of the claim against the bank.

Before considering the various contentions urged in the appeal, it would be useful to refer to the system of payment to a seller by means of letters of credit which is of a comparatively recent origin.

In Cheshire & Fifoots Law of Contracts (1956 edition) the evolution and the main features of a letter of credit are described at page 366 thus :

"The course of international trade during and since the War of 1914 has opened a new gap between business requirements and legal mechanism. The exporter has found himself confronted with peculiar difficulties. He may be dealing with a buyer whose credit is doubtful, or at least unknown ; he may be faced with the possibility of sharp fluctuations in the rate of exchange between the formation

of the contract and the date of payment; and, even if free from these peculiar anxieties, neither he nor the buyer may wish to see their capital frozen during the time which must necessarily elapse before the goods, despatched from the place of manufacture, can be sold by the buyer in his own market: (L.R. (1921) 1 A.C. 510). To meet these difficulties it has become usual to finance international trade by what are called Bankers' Commercial credits. From the lawyer's point of view, and reduced to its simplest terms, the device involves three separate transactions.

(1) A clause is inserted in the initial contract of sale, whereby the seller requires payment in a particular manner. The buyer is to ask his bank to open a credit in the seller's favour, which shall remain irrevocable for a given time.

(2) The buyer makes an agreement with his bank, whereby the bank undertakes to open such a credit in return for the buyer's promise to reimburse the bank, to pay a small commission and to give the bank a lien over the shipping documents.

(3) The buyer's bank notifies the seller that it has opened an irrevocable credit in his favour to be drawn on as soon as the seller presents the shipping documents."

Thus a letter of credit involves a mandate by the constituent (buyer), and an undertaking by a banker to meet drafts drawn under the credit by the beneficiary of the credit (e.g. the seller) in accordance with the conditions laid down therein. The credit is designed to facilitate trade with foreign countries. There may be cases where the bank, with whom a constituent opens a letter of credit, has no office at the place where the credit is to be operated on, *i.e.*, where payments are to be made under the contract. In such cases, the credit opening bank, in its turn, employs another bank which carries on business, or has a branch transacting business at that place as its agent for negotiating shipping documents and paying the beneficiary of the credit. The latter bank, known as the paying or intermediary bank, has ordinarily no privity of contract with the constituent who opens the letter of credit, *i.e.*, the buyer. In certain cases, the original bank itself opens a letter of credit with the paying bank. The relationship that exists between a buyer and banker is stated in Halsbury's Laws of England, Simonds' edition, Vol 2 at page 213 (para 399):

"The buyer who, pursuant to his sales contract, instructs his banker to open a credit, undertakes to put the banker in funds, provided the documents against which the banker pays are what the buyer calls for. The banker is bound to apply the funds to the purpose to which they are appropriated. The banker must comply rigidly with his instructions, and the same applies to the paying banker (if there be an intermediary banker) the latter being indemnified by the former if he complies strictly with the instructions. There is ordinarily no privity between the buyer and the paying (intermediary) banker."

The material portions of letters of credit in the instant case opened by the buyer, (Exhibit B-2 is a typical letter of credit) stated:

"Drafts are to be drawn at sight and accompanied by documents purporting to be full set, *clean*, freight paid, on board ocean bills of lading. . . . . . .

"I agree that for the regularity or genuineness of the above documents you are not to be responsible if they are apparently in order."

Such a letter of credit would entitle the banker to pay only if clean bills of lading were produced. The immunity granted to the banker, where he pays against documents in apparent order, cannot obviously authorise a payment on presentation of an unclean bill of lading, as such a bill (as we shall presently see) cannot be said to be in apparent order. It was accepted by learned counsel on both sides, for the purpose of the above appeals, that what the seller presented were clean bills of leading. As we stated earlier, the liability of the shipowner is rested on the basis that he issued a clean bill of lading, when the circumstances existing to his knowledge bound him to issue only an unclean one, that again rests on the assumption that, if the bill of lading had described the consignment as being in "re-used drums", it would be an unclean bill of lading.

Now what is a clean bill of lading? Broadly defined, it is one which contains nothing, in addition to its usual clauses, indicating any qualification of the condition of the goods, their packing or the liability of the shipowner.

In Halsbury's Laws of England (Simonds' edition), at page 218, it is stated:

"It has not been decided what is a "clean" bill of lading, but in English practice it is one which does not contain any reservation as to the apparent good order and condition of the goods or the packing."

Scrutton defines it in his book on Charter Parties and Bills of Lading (16th edition) at page 175 (note 1), as one

" in which there is nothing to qualify the admission that so many packages are shipped in good order and well conditioned. "

In Carver's Carriage of Goods by Sea (10th edition), it is stated at page 66 :

" The general statement in the bill of lading that the goods have been shipped in good order and condition " amounts (if it is unqualified) to an admission by the shipowner that, so far as he and his agents had the opportunity of judging, the goods were so shipped. If there is no clause or notation in the bill of lading modifying or qualifying the statement the goods were " shipped in good order and condition ", the bill is known as a clean bill of lading. Such an admission creates an estoppel as between the shipowner and an indorsee, who, on the faith of that admission, has become indorsee for value of the bill of lading. "

Lord Wright observed in *Canadian and Dominion Sugar Company Ltd.* v. *Canadian National (West Indies) Steamships Ltd.*[1], that if the statement at the head of the bill "Received in apparent good order and condition " had stood by itself, the bill would have been a "clean" bill of lading, an expression which meant at least in a context like that, there was no clause or notation modifying or qualifying the statement as to the condition of the goods.

A clean bill of lading is, therefore, one that does not contain any reservation as to the apparent good order or condition of either the goods themselves. or their packing (Per Salmon, J., *British Imex Industries* v. *Midland Bank*[2]). Therefore, a defect in packing, if noted in a bill of lading, would render it an unclean bill.

The learned counsel for the buyer first contended that the mere fact that goods were packed in re-used drums would itself mean that they were not properly packed, as re-used drums would not be as good as new ones and as fibre cases would wear out by use. From that, it was argued that if the bill of lading disclosed that re-used drums were utilised for packing, that would by itself indicate defective packing, with the result that there would only be an unclean bill. We cannot, however, agree with such a broad statement of the position. In certain cases, used or seasoned material would be more suited for packing than new and unused ones. In *Armstrong* v. *Allen Bros.*[3], linseed oil was packed in old seasoned casks which were peculiarly suited to hold such oil. It was held that there was no defect in packing and that the shipowner could have given a clean bill of lading.

It was then contended that, as there was no specific denial in the written statement of the averment in the plaint that the goods had been defectively packed, it must be taken that there was an implied admission of it. Paragraph 9 of the plaint contained the following :

" When the steamer in question arrived at Madras, the plaintiffs who had cleared the said documents wanted to take delivery of the goods, and it was discovered that the packing was defective and in re-used drums and the contents were coal dust instead of Fresh Monsanto Polystyrene Injection Moulding Powder in granules (not reground) ".

Paragraph 4 of the written statement which controverted the averments in paragraph 9 of the plaint, did not specifically deny the statement as to the insufficieny of packing. The 2nd defendant merely denied therein that they entered into any secret arrangement with regard to the goods or containers, or that they failed to disclose true facts to any one to whom they owed any duty of disclosure, or that they or their agents had at any time admitted that any of the facts stated by them or their agents were untrue. It was also pointed out by reference to Exhibits B-46 to B-48 that, at no stage, was it the case of the appellant that packing was not defective. On the other hand, Mr. O.T.G. Nambiar, the learned counsel appearing for the shipowner, contended that the averments in the plaint should be read stating that the defect in packing was only by reason of re-used drums being employed for the purpose, and that they could not be held as implying two distinct heads of the condition of the goods, *viz.*, (1) there was a defect in packing, and (2) re-used drums were used. We cannot, however, agree that the averments could be so read : but we prefer not to rest our decision on any implied admission in the written statement.

1. L.R. (1947) A.C. 47.
2. (1958) 1 All E.R. 264 at 268.
3. 67 L.T. 417

Mr. Nambiar then contended that even if the words " re-used drums " had been used in the bill of lading, they would not derogate from the general words, " received in apparent good order or condition " and that the document would have been what it was, namely, a clean bill of lading. The learned counsel referred, in this connection, to Article 18 of the Uniform Customs and Practice for Commercial Documentary Credits. Exhibits B-33, which states :

" Clauses which do not expressly state that the goods or packing are unsatisfactory, *e.g.* " second hand cases " , " used drums " , etc., could not be considered as making reservations as to the nature of packing. "

The learned trial Judge before whom the same contention was raised rejected it, holding that the practice, evidenced by Exhibit B-33, would not apply to the present case, as the letter of credit did not state anything about the regulation of the United States of America. We agree with him. Further in the Law of Bankers ' Commercial Credits, 2nd edition, by Gutteridge, the learned author, referring to the practice observes at page 79 :

" Unless a clause has a specific technical meaning which is recognised by all those who use it or have to accept it—unless it is a term of art–it will probably be judged in law by what it means in ordinary language as governed by its context. . . . . "

There is no evidence in the present case that the words " used cases ", when used in connection with the condition of packing, will have no significance whatsoever. The words, standing by themselves, would indicate that the material was not new. It is not the case of any party that used drums were particularly suited for packing Polystyrene powder. In *Armstrong* v. *Allan Brothers*[1], to which case we have made reference earlier, there was a consignment of linseed oil which was described in the mate's receipt as being contained in " old casks ". The shipper wanted a clean receipt to be given, but the shipowner gave only a receipt with an endorsement that the oil was contained in " old casks ". The learned Judge held that the words, " old casks ", prevented the mate's receipt from being a clean one. This conclusion was arrived at, notwithstanding the fact that linseed oil was stated to have been always shipped in casks seasoned by having carried potroleum, and that new casks were unfit for that purpose. On the facts of the case, the learned Judge found that the casks in question were of the usual character, and in sound condition and in every way entitled to a clean receipt. That decision established two propositions : (1) that, where the packing is good, it will be open to a shipowner to have a clean receipt without using the word ' old ' notwithstanding the fact that old casks were used and (2) that, where the word " old " is used in the bill of lading or mate's receipt with reference to the packages, it would be an unclean bill or receipt. It is not, however, the case of the shipowner, that re-used drums are particularly suited for packing Polystyrene powder, or that the packages were in such a sound condition that it, after exercising a judgment, granted a clean bill of lading. On the other hand, evidence discloses that the clean bill was given at the request of the seller and after taking an indemnity from him.

The question then is whether the use of the word, " re-used drums ", would have altered the character of the bill of lading. That question can, in the circumstances of this case, be best answered by ascertaining what the parties themselves thought about it.

Side by side with the evolution of trade on the basis of letters of credit, the practice of obtaining clean bills of lading from a shipowner appears to have developed. It is said that the universal practice of a banker is to decline to negotiate and pay on bills of lading, which are not clean, unless he has express instructions therefor, or is willing to take a risk (see Law of Bankers ' Commercial Credit by Gutteridge, 2nd edition, page 77). But a consignor may not always be able to obtain clean bills of lading, for external defects might exist in the goods (sometimes defects which might not even affect the carriage of the contents safely to the destination). International Commerce occasioned by the prudence of the banker and the necessities of the trader evolved a method of getting over the difficulty. The shipowner was willing to oblige

1. 67 L.T. 417.

the shipper, and issue clean bills of lading in respect of consignments which would not be entitled to the issue of such bills, after taking an indemnity from the shipper for any loss he might sustain by reason thereof, thus enabling the latter to satisfy the terms of the letter of credit. Where the goods reach their destination without loss, there would be no difficulty : if they do not do so, the shipper would expose himself to liability to the consignee or his representative, though the loss might not be due to the fault of the shipowner, and, in case he pays any damage, he would have recourse against the shipper who would be bound to indemnify. This practice has been referred to by Pearce, L.J. in *Brown Jenkinson* v. *Percy Dalton (London) Ltd.*[1], at page 638 thus :—

> "In the last 20 years it has become customary in the short sea trade in particular, for shipowners to give a clean bill of lading against an indemnity from the shippers in certain cases where there is a *bona fide* dispute as to the condition or packing of the goods. This avoids the necessity of rearranging any letter of credit, a matter which can create difficulty where time is short. If the goods turn out to be faulty, the purchaser will have his recourse against the shipping owner, who will in turn recover under his indemnity from the shippers."

It can readily be realised that it was this practice that was taken advantage of in the present case. The seller was anxious to get money from the bank. It was in his interests (particularly having regard to his fraudulent object) that he should get a clean bill of lading, as otherwise he would not be able to get the money under the letter of credit. The goods were packed in re-used drums, as the mate's receipt showed. The seller must have thought that, if the same description was adopted in the bill of lading, it would not be a clean bill. Otherwise, it is ununderstandable why he should request the shipowner for a clean bill of lading and give an indemnity against loss. The shipowner, who must have been aware of the practice, evidently knew that omission of the word " re-used " was required to enable the seller to draw on the letter of credit. There was no need to take any indemnity if the omission of the word " re-used " was immaterial and would not expose the shipowner to any loss. Indeed, the indemnity letter expressly covers any loss which it may sustain by reason of deleting the word " re-used " in the description of the drums. It is obvious that the shipowner would not have deleted those words except for the letter of indemnity. It is plain, therefore, that, in the opinion of the shipper as well as the shipowner, the use of the word " re-used " would not make the bill of lading a clean one, so as to enable the seller to negotiate it freely. This consciousness of the parties can be taken as the best interpretation of the significance of the word, " re-used " in a bill of lading. It follows that, apart from the principle of the decision in *Armstrong* v. *Allen Brothers*[2], the use of the word " re-used " in the bill of lading would have rendered it an unclean bill.

It was contended for the appellant (shipowner) that, when the bill of lading purported to describe the consignment as "drums" simpliciter, there was no misstatement, as "re-used drums" could still be called drums. The question, however, is not whether the mere use of the word "drums" would not apply to the packages. The bill of lading contains a statement that the goods were received on board in apparent good order and condition. We have pointed out that, if the words " re-used drums" had been used, the apparent good order would be qualified by those words, and the bill of lading would be rendered an unclean bill. In the circumstances of this case the omission of the material word was deliberate, and it enabled the seller to obtain monies under the letter of credit which he would not have been able to do otherwise.

Mr. O.T.G. Nambiar then contended that the shipowner was under no duty, either under the statutory or common law, to give an accurate description of the goods.

To deal with this contention , it is necessary to digress a little on the duties of the banker, shipper and the shipowner. It is necessary also to consider the nature of the statements contained in a bill of lading. It is obvious that a banker, in whose favour a letter of credit is opened, owes a duty to his constituent to act strictly in

1. L.R. (1957) 2 Q.B. 621. 2. 67 L.T. 417.

accordance with the terms thereof. This is not any principle peculiar to the law of banking: an agent would owe such a duty to his principal. Where, therefore, a beneficiary presents shipping decuments and demands monies under a letter of credit, it will be the duty of the bank to scrutinise the documents tendered, and see whether the instructions given by its constituent (*e.g.*, the buyer who opens the credit) have been strictly complied with. The bank would be bound to refuse to accept, or negotiate the shipping documents, or pay the beneficiaries under the letter of credit, unless the documents presented strictly conform to those covered by the instructions. If, for example, a letter of credit authorises the payment on presentation of clean bills of lading, it would not be open to the bank to pay against an unclean bill. A bank, contravening the instructions or committing a default in that respect by paying the seller, would not be entitled to recover that amount from its constituent: it will forfeit also any commission payable by the constituent therefor. A beneficiary under the letter of credit (*e.g.*, the seller) should also strictly observe the terms and conditions, under which credit is made available to him by the person opening the credit: that would arise under the very contract which had been entered into. One of the duties of a seller under a c.i.f. contract (the instant case is a c.i.f. contract) is to procure a contract of affreightment under which the goods will be delivered at the destination as specified in the contract. Where the terms of credit authorises payment on presentation of a clean bill, it will obviously be his duty to present a clean bill. If circumstances are such that in respect of the goods consigned by him he would be entitled only to an unclean bill of lading, he should not draw monies thereon; if, in those circumstances, he procures a clean bill of lading (knowing that he was not entitled to it) and obtains money under the credit note, he will undoubtedly be guilty of deceit. A shipowner, who, with knowledge of the intention of the shipper gives a clean bill where the condition of the consignment was such that no such clean bill could be given, would be equally guilty of deceit.

A bill of lading is a writing signed by the owner of the ship, in which the goods are embarked, acknowledging the receipt thereof, the conditions of carriage and an undertaking to deliver at the end of the voyage; it is a document of title, and a mere assignment thereof would pass the title of the assignor to the goods, and also amount to a constructive delivery of the same. Having regard to the nature of the document and its importance in international commerce, the shipowner would have an obvious duty to describe correctly therein the condition of the goods received by him. The goods being on sea, the concerned persons, *i.e.*, bankers, traders, etc., who negotiate the bill, will have to depend only on the statements contained therein. This does not, however, mean that a shipowner guarantees the contents of the packages. But he should note in the bill all external defects, or defects noticeable on inspection of the goods, or their packing which existed when they were delivered to him. The printed form of a bill of lading generally contains a clause that goods were received on board the ship in apparent good order and condition. Good order implies that packing was sound: good condition relates to the apparent condition of goods themselves. Where a consignment is defective, it would obviously be the duty of the shipowner to qualify those words, otherwise the concerned public would be misled by the general statement. In *Brown Jenkinson & Co., Ltd.* v. *Percy Dalton (London) Ltd.*,[1] Morries, L.J., observed at page 631:

"A shipowner clearly intends that the bill of lading he issues should be relied upon. He intends that it should be relied upon by those into whose hands it properly comes; consignees, bankers and indorsees, must be within his contemplation. A bill of lading is issued with the purpose that it should be relied upon. This could not have been more clearly illustrated than it was in the testimony of the plaintiffs' witness. He knew, for example, that banks are very often only prepared to advance money if clean bills of lading are forthcoming. If a shipper knows that he will only be paid if he can present a clean bill of lading and knows that the goods he is shipping are so defective that they could not be given a clean bill, and if, in order to get his money, he persuades a shipowner to issue a clean bill, and if the shipowner both knows that a clean bill ought not to be issued and that the bill will be relied upon by others, it seems to me impossible to contend that the shipowner does not make a representation with the intention that is should be acted upon."

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1. L.R. (1957) 2 Q.B. 621.

The statements contained in a bill of lading being thus representations, the shipowner would be held liable, if they amount to actionable or fraudulent misrepresentation to all those persons to whom such statements could be held to have been made, who suffer damage by acting on the faith thereof. In *Silver* v. *Ocean Steamship Co., Ltd,*[1] it was held that the words "received in apparent good order and condition" in a bill of lading, were not terms of a contract between the shipper and the shipowner, but a representation of a fact. One consequence of such a representation will be that the shipowner will be estopped from contending that the goods were not received in apparent good order and condition as against any person who, acting on that representation, suffered a loss. This liability is relied on by the appellant to contend that so long as the goods were delivered without any loss in transit, no occasion for enforcing this liability against the shipowner will, at all, arise, and, it would be immaterial whether the goods had been correctly described in the bill of lading or not and, therefore, even if the omission of the words re-used is considered as a material omission, the consignee would have no cause of action against the shipowner. The principle, on which the liability of the shipowner is based in case of loss of goods, is different from the one on which the present claim is based. Let us examine the basis of the former liability. A shipowner would ordinarily be liable to pay the consignee such damages as occurred during the voyage. Where, however, he delivers the goods in the same condition in which he himself got them, there would be no liability; even if loss had occurred for them, such damage would have been due to reasons other than the fault of the carrier, *e.g.*, a case of defective packing. Where therefore goods are loaded defective packed, but the shipowner does not note it in the bill of lading, it would be a representation that the goods have been received in good condition. Persons who act on the faith of that representation by becoming indorsees of the bill of lading, etc., who suffer a loss, can hold the shipowner liable for it, notwithstanding that the loss was due to a defective packing, and the latter would be estopped from pleading that the loss was not due to any fault of his. This liability is on the basis of the contract of carriage, whereas the liability now sought to be enforced, is in tort. It is one for damages for actionable misrepresentation. It cannot be disputed that when the appellant issued a clean bill of lading, not noting the defects in the description of packing as contained in the mate's receipt, it did represent that the goods were received in apparent good order and condition, while they were actually not so. The description in the mate's receipt would indicate that the shipowner knew that the statements in the bill of lading were not correct. It cannot be said in those circumstances that the shipowner actually and honestly believed the statements therein as truly representing the condition of packing, particularly in the context of the existing commerical practice and the indemnity he took covering himself against claims for the deletion of the word "re-used."

It was contended for the appellant that he was not aware of the terms of the letter of credit, and that there was no evidence of his being a party to the seller's fraud. We cannot accept the first portion of the contention. We have already referred to the existence of an usage in international trade under which, a seller, who could obtain only an unclean bill of lading which would not enable him to draw on a letter of credit, obtains from the shipowner a clean bill agreeing to indemnify him. The appellant must have been aware that a clean bill was required to induce the bank to pay the money ; it was his duty, therefore, to disclose every circumstance existing to his knowledge which would impair the negotiability.

We are of opinion that the latter part of the contention is not relevant for the present case. The liability of the appellant is not for the non-delivery of the goods contracted for, but for a failure to do its duty by giving a correct bill of lading, or for a fraudulent misrepresentation therein. There can be no doubt in the present case that misrepresentation was the direct cause of the loss. If the shipowner had given an unclean bill of lading (which alone he was bound to given in the known circumstances of the case), the banker would not have paid, and even if he did, the buyer would not be bound by it, having regard to the terms of the letters of credit.

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1. L.R. (1930) 1 K.B. 416.

In view of the fact that bill of lading is a document of title to goods which would pass by negotiation, the representations or misrepresentation therein should be held to have been made to every individual who comes by it as a holder thereof. There is thus a breach of duty on the part of the shipowner in not disclosing the correct facts which would affect the negotiability of the bill of lading and an actionable false representation as to the condition of the packing of the goods received by him. The 1st respondent who suffered loss by reason of that misrepresentation would be entitled to the decree granted to him by the lower Court. The appeals fail and are dismissed with costs. (Advocate's fee one set.)

P.R.N. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KAILASAM.

A. Ganesa Mudaliar .. *Petitioner**

v.

Chellammal .. *Respondent.*

Madras City Tenants' Protection Act (III of 1922) (as amended in 1955)—Applicability—Benefits of the Act—Available to tenant holding over at date of commencement of Act—New tenancy—When could be inferred

The Madras City Tenants' Protection Act confers the benefit under it on tenants holding over at the commencement of the Act. Where a tenant continues on the land on the same conditions as before, the mere fact that a fresh lease-deed was executed by him does not disentitle him from claiming the benefits of the Act. If there are any variations in the terms of the tenancy it will be a new tenancy and the tenant will not be entitled to the benefits of the Act. The burden is on the landlord to prove that there has been a variation of the terms of the tenancy.

Ranganatham v. *Ethirajulu*, (1940) 1 M.L.J. 24 : L.R. 67 I.A. 25 : I.L.R. (1940) Mad. 172 (P.C.); *Nayar Varada Pillai* v. *Ghulam Dastagir*, (1945) 2 M.L.J. 190 ; *Ramaswami Chettiar* v. *Ramaswami Pillai*, (1948) 1 M.L.J. 274, referred.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Decree of the Court of the Small Causes (II Judge) Madras, dated 4th September, 1959 and passed in Ejectment Suit No. 28 of 1958.

S. V. Kumaraswamy, for Petitioner.

B. Kalyanasundaram, for Respondent.

The Court made the following

ORDER.—The tenant under the Madras City Tenants' Protection Act, is the petitioner before me. The respondent filed an Ejectment suit No. 28 of 1958 on the file of the Court of Small Causes alleging that she leased the land in dispute to the defendant by a lease deed dated 2nd December, 1956, on a monthly rent of Rs. 6, and that the defendant had agreed to vacate the premises and also to remove at his own cost the temporary zinc shed put up by him. She also pleaded that the provisions of the Madras City Tenants' Protection Act would not apply to the defendant as the lease commenced on 2nd December, 1956, that is, after the Madras City Tenants' Protection (Amendment) Act, 1955, came into force. The defendant contended that he was protected under the said Act and that he was not liable to be ejected. The lower Court found that the lease deed Exhibit P-2 (2nd December, 1956) was insisted upon to show that the old tenancy had been terminated and a fresh tenancy had been created in 1956. The lower Court relied on the fact that the defendant was forced to close his tea-shop business for ten days. On the facts, the lower Court came to the conclusion that the old tenancy had been terminated and a fresh tenancy commenced in 1956, that is, after the Act came into force and that therefore the tenant was not entitled to the benefits of the Act.

The question for consideration in this petition is whether Exhibit P-2 the lease agreement dated 2nd December, 1956, started a fresh lease or is a continuation of the old lease. The defendant was running a tea shop in the plaintiff's land since 1949.

*C.R.P. No. 1525 of 1959.

2nd February, 1961.
(13th Magha, 1882 Saka).

He paid Rs. 200 in 1949 and in 1952 he paid an advance of Rs. 145. From 1952 he was paying a monthly rent of Rs. 6 continuing the tenancy on the same terms. The landlord gave a notice Exhibit P-1 to quit the land. On receipt of the notice, the defendant closed the tea shop for 10 days. Afterwards there was some mediation and the tenant executed Exhibit P-2 the present lease deed. On the evidence there is no material to come to the conclusion that the tenant vacated the premises during these 10 days. The tenant kept the shed locked for 10 days till he executed Exhibit P-2. So far as the terms of the lease deed Exhibit P-2 are concerned, the tenant contended that he continued on the same terms as before. This statement has not been challenged in the cross-examination. The plaintiff has also not let in evidence to show that the terms of the lease Exhibit P-2 were different from those of the original oral lease.

The learned counsel for the petitioner contends that Exhibit P-2 commenced a fresh tenancy and as such section 1 (3) of the Madras City Tenants' Protection Act, 1921, as amended in 1955, has no application as this does not relate to a tenancy created before the commencement of the said Act. He relies on a decision of the Privy Council reported in *Ranganatham* v. *Ethirajulu*[1]. The facts of the case as set out in the headnote are as follows :

" A tenant whose lease expired on September 30, 1922 and who continued in possession and on February 1, 1923, obtained a new lease for ten years from October 1, 1922, is not, therefore, entitled, on the termination of his tenancy, to the benefit of the provisions of the Act, for, though his physical possession was continuous, his possession after October 1, 1922, is attributable to the new tenancy formally embodied in the lease executed on February 1, 1923. "

Their Lordships of the Privy Council observed at page 176 :

" The benefit of the remaining sections. . . . . cannot be of avail to the appellants unless and until, they have shown that the tenancy here in question was created before the commencement of the Act within the meaning of section 1 (3). "

In conclusion their Lordships observed :

" But their Lordships are clearly of opinion that, though the physical possession was continuous the possession from 1st October was attributable to a new tenancy, which was formally embodied in the lease, dated 1st February, 1923, the increased rent thereby provided having been paid by the from 1st October, 1922, in terms of the verbal agreement for a lease. Their Lordships accordingly, concur in the view of both the Courts below, that the tenancy here in question was not created before the commencement of Act, and that the Act does not apply. "

This decision was referred to by King, J., in *Nayar Varada Pillai* v. *Ghulam Dastagir*[2]. There the learned Judge was dealing with a case in which the tenant had entered into occupation of certain premises prior to the passing of the Madras City Tenants' Protection Act, 1922 and while continuing in such possession executed a rent deed after the Act came into force on the same rent and on practically the same terms as before. His Lordship observed that in the case of the Privy Council reported in *Ranganadham* v. *Ethirajulu*[1], there was one significant fact, and that is, that the tenancy created was at an increased rate of rent from that previously paid, whereas in the case before the learned Judge the rate of rent remained the same before and after the execution of the lease deed. His Lordship was of the view that if there had been no difference in the terms of the two leases, which were considered by their Lordships of the Privy Council, the decision would not have been that a new tenancy was created by the second lease but that the tenancy originated with the first lease. The learned Judge found that the tenancy previously begun, before the Act came into force and the execution of the rent deed after the commencement of the Act did not amount to a creation of a new tenancy. In *Ramaswami Chettiar* v. *Ramaswami Pillai*[3], their Lordships Horwill and Bell, JJ., had occaion to refer to the above two decisions, namely, *Ranganadham* v. *Ethirajulu*[1],

1. (1940) 1 M.L.J 24: L.R. 67 I.A. 25: I.L.R. (1940) Mad. 172 (P.C.).
2. (1945) 2 M.L.J. 190.
3. (1948) 1 M.L.J. 274.

and *Nayar Varada Pillai* v. *Ghulam Dastagir*[1]. Referring to the decision of King, J., their Lordships observed :

" A case somewhat similar to the present case came before King, J., in *Nayar Varada Pillai* v. *Ghulam Dastagir*[1], in which the learned Judge distinguished the case before him from that before their Lordships in *Ranganadham* v. *Ethirajulu*[2], on the ground that in the lease he was considering the terms were substantially the same. It is not necessary for us to consider how far the distinction drawn by King, J., was valid. "

Thus the Bench did not express any definite opinion on the correctness or otherwise of the decision of King, J., in *Nayar Varada Pillai* v. *Ghulam Dastagir*[1]. In C.C.C. A. No. 107 of 1950 (reported in 1954 M.W. N. Short Notes, page 100) Somasundaram, J., held :

" So long as the rent is the same and there was no substantial variation in the terms of the lease despite the fact that a fresh lease was executed subsequent to 1922, the tenancy must be deemed to be a continuation of the tenancy prior to the coming into force of the Madras City Tenants' Protection Act. It is for the plaintiff to prove the variation in the terms of the tenancy that existed prior to 1922 and the one that existed after 1922, the tenancy being admitted by both parties. Where no evidence is let in by the plaintiff, the tenant could be considered to have been paying the same rent. "

From a reading of the decisions of King, J., in *Nayar Varada Pillai* v. *Ghulam Dastagir*[1], and of Somasundaram, J., in C.C.C.A. No. 107 of 1950 it is clear that if the tenancy was on the same terms the tenant would have the benefit of the Act though a fresh lease deed was executed after the commencement of the Act. If there are any variations, it will be a new tenancy and the tenant will not be entitled to the benefits of the Act. I respectfully agree with the above two decisions. The Act confers the benefit on tenants holding over at the commencement of Act. It could not have been the intention of the Legislature to exclude tenants who continue on the land on the same conditions after executing a fresh lease deed. In this case, as already observed, the statement of the tenant that he was continuing the tenancy on the same terms as before has not been challenged. The burden is on the landlord to prove that there has been a variation of the terms of the tenancy, but the landlord has not discharged that burden. In the circumstances, I hold that the tenant is entitled to the benefit of the Act. The petition is therefore allowed. No costs.

R.M. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATADRI.

M. C. Chaganlal Sowcar .. *Appellant**

v.

P. Anantaraman and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 58 (a)—' Mortgage-money'—Interest due under the mortgage is charged upon the mortgaged property unless there is contract to the contrary—Personal covenant to pay interest—Not a contract to the contrary—

* * * * * *

Under section 58 (*a*) of the Transfer of Property Act ' mortgage-money ' is the amount due for principal and interest of which payment is secured for the time being.

The question whether the interest and other amounts payable by the mortgagor to the mortgagee are monies of which payment is secured must be decided on the actual provisions of the document of mortgage.

A mortgagee is entitled to treat the interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary.

The provision in the document that the mortgagors made themselves personally liable to pay interest would not amount to a contract to the contrary.

1. (1945) 2 M.L.J. 190. I.L.R. (1940) Mad. 172. (P.C.).
2. (1940) 1 M.L.J. 24 : L.R. 67 I.A. 25 :

* L.P.A. No. 16 of 1958 in (A.A.O. No. 106 of 1956). 21st November, 1960. (30th Kartika, 1882, Saka).

The provision in the document in the instant case " if we fail to pay when you demand, the amount due according to this document, you can recover the said amount from us and from the property described below and from our other properties " was held to amount to an express recital that the interest due under the mortgage was charged on the mortgaged property.

Ganga Ram v. *Natha Singh*, (1924) 51 I.A. 377 : 47 M.L.J. 64 : I.L.R. 5 Lah. 425 (P.C.), referred and followed.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Ramaswami Gounder dated 31st January, 1957 and made in A.A.O. No. 106 of 1956 preferred against the Order of the District Court of Chingleput dated 4th January, 1956 and made in A.S. No. 116 of 1954 (O.S. No. 114) of 1952, D.M.C., Poonamallee).

K. Krishnaswami Ayyangar, for Appellant.

V. Seshadri and *K. S. Ramamurthi*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal against the Judgment of Ramaswami Goundar, J., arises out of a suit for redemption filed by the first respondent. The mortgage sought to be redeemed was executed on 20th March, 1930, by the 2nd respondent and his undivided brother one Vaidyanathan, who died subsequently, for securing repayment of a sum of Rs. 2,000 borrowed by them along with their uncle. On 5th March, 1952, the second respondent sold the mortgaged property to the first respondent directing the latter to redeem the mortgagee. The first respondent offered to redeem the mortgage on payment of Rs. 2,000, the principal amount, but the first defendant (appellant) refused the offer and insisted that besides the principal, other sums including interest due under the provisions of the mortgage deed should also be paid before the mortgage could be redeemed. Thereupon, the suit, O.S. No. 114 of 1952, was filed by the first respondent in the Court of the District Munsif of Poonamallee. The learned District Munsif decreed the suit. He held that the first respondent-plaintiff was entitled to the relief of redemption on payment of the principal sum of Rs. 2,000 and as that sum has been deposited into Court, he passed a preliminary decree for redemption. There was an appeal by the first defendant to the Court of the District Judge of Chingleput. The learned District Judge allowed the appeal and set aside the decree passed by the District Munsif and remitted the suit to the District Munsif for adjudication as to what would be the amount due to the mortgagee in the light of the observations made in his judgment. The learned District Judge held that the plaintiff would not be entitled to obtain redemption unless he paid also the other amounts including interest, which were payable under the deed of mortgage. Against the order of remand passed by the District Judge, there was an appeal to this Court—C.M.A. No. 106 of 1956. Ramaswami Gounder, J., allowed that appeal and restored the decree of the District Munsif, but granted leave to appeal. Hence this appeal by the first defendant.

The material portions of the mortgage deed run thus :—

" We have mortgaged with possession to you the house belonging to Nos. 1 and 2 of us and in our enjoyment and have received from you in the presence of the Sub-Registrar Rs. 2,000 and for the interest on this amount at Re. 1-12-0 per cent per mensem, you shall yourself let out the house for rent and adjust the same in satisfaction of the interest. If the rent falls short or no rent is at all yielded, such amount as represents the interest due we shall pay to you or to your order before the 20th of the month and take receipt. We shall ourselves pay the quit rent, Union taxes, etc., for the property and also carry out necessary repairs and thereby if you are obliged to pay the rents, taxes or the repairs charges, such amount also shall be paid by us with interest at the above said rate. When we pay the principal amount, you shall at that time cancel this document and deliver the house to our possession. If we fail to pay you when you demand, the amount due according to this document, you can recover the said amount from us and from the property. . . . . described below and from our other properties."

The deed itself was styled as a deed of possessory morgtgage.

Under section 58 (*a*) of the Transfer of Property Act " Mortgage money " is the amount due for principal and interest of which payment is secured for the time being. Under section 60 of that Act, the mortgagor has a right on payment or tender at a proper time or place of the mortgage money to obtain redemption.

The question, therefore, is whether the interest and other amounts payable by the mortgagor to the mortgagee are moneys of which payment is secured. The question must be decided on the actual provisions of the document and the decisions in other cases in which other documents had been construed can only render us assistance in a general way. Their Lordships of the Judicial Committee held in *Ganga Ram* v. *Natha Singh*[1], that a mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary. There were expressions used in the mortgages in the case before the Judicial Committee, which indicated that by the term " mortgage money " the sums actually advanced were contemplated. Nevertheless, their Lordships ruled that this does not displace the general principle that interest is a charge upon the property and payable upon redemption. This decision of the Privy Council was applied by the Lahore High Court in *Manghi* v. *Dialchand*[2]. It was held that where the mortgage deed contains a stipulation for payment of interest, the mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the property. The learned Judges also decided that the fact that the mortgagors made themselves personally liable for the payment of the interest was not incompatible with the fact that the interest formed also a charge on the property. In *Rang Raj Singh* v. *Sheonarain Lal*[3], the learned Judges pointed out that the mere fact that there was an express reference to interest in the personal covenant and no express reference to interest in the hypothecation clause was not evidence of a contract to the contrary and they applied the rule that the mortgagee is entitled to treat the interest due on the mortgage as a charge on the mortgaged property.

The learned Judge Ramaswami Gounder, J., was apparently impressed by the decision of this Court in *Nammalwar Chetty* v. *Krishnaswami Chetty*[4], and considered that the present case fell within the scope of the ruling in that case. In the mortgage deed, which was before the learned Judges in that case there was the following express provision :—

" We shall pay the aforesaid principal of Rs. 10,000 to you or your order, redeem this mortgaged property and take back the document."

This provision in the opinion of the learned Judges seemed to indicate that the sum to be repaid prior to redemption for the purpose of redemption was merely the original principal sum. On a construction of the relevant terms of the document before them, they came to the conclusion that the remedy, which the party secured by the mortgage for interest not discharged by rents and profits, was a personal remedy and therefore interest was not a charge on the mortgaged property and was left to be recovered only under a personal covenant of the mortgagors. This decision cannot apply to the suit mortgage. The following provision in it is, in our opinion, conclusive :

" If we fail to pay when you demand, the amount due according to this document, you can recover the said amount from us and from the property described below and from our other properties."

There is undoubtedly a personal convenant to pay and the mortgagee is given the right to recover the interest based on the personal covenant, but there is also an express provision that the amount outstanding shall be recovered from the mortgaged property. Not only is there no contract to the contrary, that is to say, no contract that interest shall not be charged on the mortgaged property, there is also an express recital that it is so charged. As was pointed out in *Manghi* v. *Dialchand*[2], the fact that there was a personal covenant to pay the interest would not by itself be a contract to the contrary. It is true that in one part of the document it is provided that when the mortgagors pay the principal amount the document shall be cancelled and the mortgaged property delivered to the mortgagors. Reading the entire document as a whole, it is obvious that at the time of the execution

1. (1924) 47 M.L.J. 64 : L.R. 51 I.A. 377 : I.L.R. 5 Lah. 425 (P.C.).
2. (1926) I.L.R. 7 Lah. 559.
3. A.I.R. 1928 Pat. 398.
4. (1923) 16 L.W. 743.

of the mortgage, the parties presumbly contemplated that the interest would be recovered from the rent fetched by the mortgaged property and, even if there was any deficiency, it would be periodically made good by the mortgagors. It was also expected that the mortgagors would duly and faithfully carry out their undertaking to pay the quit rent, taxes, etc. If these provisions had been carried out by the mortgagors, then obviously the only amount, which would be outstanding, would be the principal amount, in which case it would be sufficient to pay the principal amount only to enable the mortgagors to redeem the mortgage.

Learned counsel for the respondent referred us to three decisions, apart from relaying upon *Nammalwar Chetty* v. *Krishnaswami Chetty*[1], with which we have dealt above and we shall refer briefly to these. In *Ali Ahmed* v. *Kalka Prasad*,[2], the mortgage deed *inter alia* stipulated that the deficiency in interest would be made good by the mortgagor from his own pocket. There were no words which could be construed to confer power on the mortgagee to recover the outstanding interest from the mortgaged property. In *Lok Chand* v. *Hazar Khan*[3], a decision of the Punjab Chief Court, it was held on the terms of the mortgage in question that interest was not charged on the mortgaged property. *Jwala Singh* v. *Teja Singh*[4], does not take the matter any further. The mortgage deed in that case provided that the mortgagor shall redeem the property on the payment of the principal money within three years and that the mortgagor shall pay interest at the rate of Re. 1-6-0 per cent. without objection. After the decision of the Judicial Committee of the Privy Council in *Ganga Ram* v. *Natha Singh*[5], we have grave doubts as to the correctness of this decision. In any event, in the mortgage deed in that case there was no provision that the interest could be recovered from the mortgaged property, as we have in the mortgage deed before us.

We hold that the construction placed on the material provisions of the mortgage deed by the learned District Judge was right and the learned Judge was wrong in holding that there was a contract contrary to the general rule that interest payable under a mortgage deed would also be charged to the mortgaged property and would be included in the mortgage money on payment of which alone the mortgagor would be entitled to obtain redemption of the mortgage.

The appeal is allowed and the order of the learned District Judge remitting the suit to the District Munsif for ascertaining the amount actually due under the mortgage is restored. The appellant will get the costs of this appeal from the first respondent. He will also be entitled to the costs before Ramaswami Gounder, J. and in the lower appellate Court. The costs in the trial Court will be provided when the suit is disposed of.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

Joint Receivers of the Estate of Dewan Bahadur C. Arunachala Mudaliar, Zamindar of Chunampet .. *Applicants**

v.

The Commissioner of Income-tax, Madras *Respondents.*

Income-tax Act (XI of 1922), *sections* 25-*A* (1) *and* (3) *and* 41—*Preliminary decree for partition—No subsequent division by metes and bounds—Whether the assessee continued to be a Hindu undivided family for the purposes of the Act—Distinctions between association of persons and Hindu joint family.*

The mere circumstance that a declaration of the fractional interest of the several coparceners has been given in the preliminary decree for partition of joint Hindu family does not amount to a

1. (1973) 16 L.W. 743.
2. (1916) 37 I.C. 95.
3. (1920) 41 I.C. 59.
4. (1916) 71 I.C. 801.
5. (1924) 47 M.L.J. 64 : L.R. 51 I.A. 377 : I.L.R. 5 Lah. 425 (P.C.).

*Case Referred No. 29 of 1956.

12th October, 1960.
(20th Asvina, 1882, Saka).

partition in definite portions that is contemplated in section 25-A of the Indian Income-tax Act. It is only in the case of properties which by their very nature are incapable of physical division that the absence of actual division thereof is held not to offend against section 25-A of the Act.

It may be that if there has been an actual division among the members of the family subsequent to which they for purposes of easy management prefer to manage the properties as an association, such a result, *viz.*, the assessment in the status of an association of persons may be possible ; but it is not possible, so long as an actual division has not taken place.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922) in R.A. Nos. 623 to 626 of 1955-56 on its file (I.T.A.Nos. 5070 to 5073 of 1954-55 assessment years 1950-51 to 1953-54) for decision on the following questions of law, *viz.* :

(i) Whether section 41 is mandatory or only an alternatives available to the Income-tax Authorities in certain special cases ?

(ii) On a proper construction of Annexures ' A ' and ' B ' whether the Receivers aforesaid can be said to have been appointed by or under any order of a Court and received the income on behalf of each of the beneficiaries for the aforesaid years as required by section 41 in the absence of a division of the family by metes and bounds as required by section 25-A ?

(iii) Whether the assessment of the family in the hands of the Receivers on the income accruing after 6th October, 1948, till 30th June, 1952, in the assessments 1950-51, 1951-52, 1952-53 and 1953-54 is valid ?

K. Srinivasan and *D.S. Meenakshisundaram*, for Applicants.

C.S. Rama Rao Sahib, Special Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—The facts leading to this reference require to be set out at some length. The estate of the Zamindar of Chunampet was all along assessed as a Hindu undivided family. The joint Hindu family consisted of the father and his three sons, the last of whom was a minor. The two major sons commenced a partition suit O.S.No.64 of 1944 on the file of the Subordinate Judge, Chingleput, on the 11th September, 1944. In the course of that suit, a compromise was filed on the 16th September, 1948, whereby the two major sons, the plaintiffs in the suit, were appinted as joint receivers. Following this compromise, a preliminary decree was passed by the Court on 5th October, 194''. It decreed that the admitted family properties set out shall be divided into four equal shares and that each of the two plaintiffs and the defendants (father and the minor son) be allotted a one-fourth share. It set out the common liabilities to be met by the entire family estate. It specified certain amounts to be provided for the fourth defendant, the sister of the plaintiffs, both for her marriage and settlement upon her. Several other payments to be made out of the estate were also provided. Clause 6 of the decree directed that the plaintiffs

" shall forthwith take possession of all the suit properties . . . . . . and manage them as receivers on behalf of the parties and that they shall also manage the salt pans belonging to the devasthanams as it has been administered all these years and that they should discharge and provide for the liabilities mentioned in paragraph 2."

Other clauses in the decree directed the plaintiffs as receivers to make certain allowances to the parties, that is, the plaintiffs and defendants 1 to 4, in specified sums. It is common ground that there were several final decrees in the suit, the first of which was on 27th November, 1951. It effected a division of the salt pans belonging to the family with effect from 1st January, 1952. The second final decree, dated 15th April, 1953, effected a division of the cardamom estate belonging to the family. The third and last final decree dated 18th January, 1954, brought about a complete division of all the remaining assets of the family.

Immediately following upon the appointment of the plaintiffs as receivers, an application seems to have been made to the Income-tax Officer, under section 25-A (i) of the Act claiming that by reason of the preliminary decree, a partition had taken place among the members of the family. This application was rejected for the reason that the preliminary decree was subsequent to the previous year in respect of which the assessment was under question at that time. In a similar manner, further applications seem to have been made in the succeeding years with the same

result. In respect of the assessment year 1950-51, the Income-tax Officer, in dealing with a similar application under section 25-A held that there had been no division of the various assets by metes and bounds and that the assessee continued to be a Hindu undivided family for the purposes of the Act. Assessments for the assessment years 1951-52 and 1952-53 were also made on the same basis. In respect of the assessment year 1953-54, however, since one of the items of the erstwhile joint family properties, *viz.*, the salt pans, had been divided by metes and bounds by the first final decree, dated 27th November, 1951, that profit from that source was left out from that assessment. There was however an assessment as on a Hindu undivided family in respect of the income from the other properties.

It has to be mentioned here that all of these assessments were made on the receivers as representing the Hindu undivided family.

Appeals were taken to the Appellate Assistant Commissioner, the contention being that since the beneficial ownership of the various properties had passed on to the receivers, the Hindu undivided family was no longer the owner thereof, and that on and after the 5th October, 1948, when the preliminary decree was passed, separate assessments should have been made on the various erstwhile coparceners in respect of their individual shares under section 41 of the Act. This claim was shortly disposed of on the ground that though the joint status had been put an end to by the express declaration of their intention to separate, the family properties were not divided by metes and bounds or in definite portions within the meaning of section 25-A (1) of the Act. The Assistant Commissioner rejected the plea that the Receivers were in possession of the properties on behalf of each and everyone of the separated members of the family. A further appeal was taken to the Appellate Tribunal which came to a like conclusion and upheld the assessments in the status of the Hindu undivided family.

On an application under section 66 (1) of the Act, the following questions have been referred to us :

(1) Whether section 41 is mandatory or only an alternative available to the Income-tax Authorities in certain special cases ?

(2) On a proper construction of Annexures 'A' and 'B' whether the Receivers aforesaid can be said to have been appointed by or under any order of Court and received the income on behalf of each of the beneficiaries for the aforesaid years as required by section 41, in the absence of the division of the family by metes and bounds as required by section 25-A ?

(3) Whether the assessment of the family in the hands of the Receivers on the income accruing after 6th October, 1948 till 30th June, 1952, in the assessments 1950-51, 1951-52, 1952-53, and 1953-54 are valid ?

The three questions put together call for the determination of two problems :

(1) Even if the order under section 25-A (1) has not been made by the Income-tax Officer, is it permissible to make separate assessments on the erstwhile members of a joint Hindu family, or should the assessment be in the character of a Hindu undivided family ?

(2) Does section 41 permit, in circumstances as in the present case, assessments being made directly on the person on whose behalf income, profits or gains are receivable and are received by receivers, or is it mandatory that the assessment should be on the Receivers alone ?

There is no doubt that there was a joint family comprised of certain persons who were being assessed in the status of a Hindu undivided family. It is also beyond dispute that the status of the family as a joint Hindu family was disrupted by the filing of the Partition Suit in 1944. Whether or not the properties were actually divided by metes and bounds, the joint Hindu family as such had ceased to exist and as long as the properties of the family remained undivided there is no doubt that the erstwhile coparceners became tenants-in-common. What appears to be contended by the learned counsel for the assessee is that in the light of the compromise that was entered into and the preliminary decree that was passed by the Court, though the Hindu

undividied family may be an assessable entity, it ceased to own any property or to derive any income, and that notwithstanding that no order was passed under section 25-A (1) each erstwhile coparcener since he was directed to be paid his proportionate share of the income, and since his share of the family properties was also definite, should be assessed separately. It is argued that on and after the filing of the suit, the erstwhile coparceners own the property only as tenants-in-common ; the tenants-in-common through the agency of the Receivers derive the income from the property ; and it is not the Hindu undivided family that derived the income but each individual tenant-in-common.

For this starting proposition that notwithstanding section 25-A (3) of the Act, each divided member should be assessed separately, and that an assessment in the status of a Hindu undivided family is not valid, the learned counsel is frankly unable to rely upon any authority. While he no doubt concedes that the property was not divided by metes and bounds, he seeks to rely upon the provision in the preliminary decree, which, according to him, practically results in each tenant-in-common receiving his share of the income referrable to a definite portion of the family property. He relies upon clause 6 of the preliminary decree which directs the Receivers to manage the properties on "behalf of all the parties"; to clause 8, which provides for the payment of monthly allowances to each of the parties and which directs further

> "At the end of the year, if on looking into the accounts the first defendant's one-fourth share of the net income, after payment of interest on all family debts, is in excess of the aggregate allowance paid to him, he shall receive the excess or repay the overdrawing, if deficit occurs,";

and to clause 9 which provides

> "that the plaintiffs and defendants 2 to 4 shall have allowances as heretofore, *viz.*, plaintiffs and second defendant each Rs. 1,000 per month, third defendant Rs. 500 per month, fourth defendant Rs. 250 per month with conditions similar as in the case of the first defendant."

On the basis of these clauses, together with the declaration that each of the parties is entitled to a fourth share, the argument appears to be that the property had been partitioned among the various members in definite portions leading to the claim, that the various members should be assessed individually.

As we said, this proposition derives support from no decided authority, and in fact both the section itself and the cases decided thereon are opposed to this argument. The mere circumstance that a declaration of the fractional interest of the several coparceners has been given in the preliminary decree does not amount to a partition in definite portions that is contemplated in section 25-A. Some reliance has been placed upon *Meyyappa Chettiar* v. *Commissioner of Income-tax*[1]. There the principal question was whether it was open to the Department to question the mode of division of the properties among the various members of the family and whethr a partition, even, if it is unequal and unfair, could be avoided by the Income-tax Authorities on the ground of such inequality. What was decided therein was that while it was open to the coparceners to repudiate such an unequal partition, a partition made by the father is not void and will be good until it is set aside. It was not for the Income-tax Department to declare the partition to be ineffective for such a reason. It was also decided in this case that though the requirement of section 25-A was that the partition should be in definite portions, physical division or division by metes and bounds could not be demanded in the case of property which does not admit of such a mode of division. But so long as the property is of such a nature that it could be divided by metes and bounds and it is not so divided, there could not be said to be a partition within the meaning of section 25-A, and in the absence of such a partition, the Hindu undivided family could be deemed under section 25-A (3) to continue to exist for purposes of assessment. In *Charandas Haridas* v. *Commissioner of Income-tax, Bombay*[2], the effect of a partial partition was examined by the Supreme Court. The family in that case possessed certain managing agencies as family property and an oral partition was entered into giving a share of the commission to the members of the

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1. (1950) 2 M.L.J. 353 : 18 I.T.R. 586.
2. ((1960) S.C.J. 929 : 39 I.T.R. 202.

family. It was contended by the Department that is was not a partition which could be accepted under section 25-A. Their Lordships held however that while the Hindu Law required a division of the properties to be effective so as to bind the members, it did not further require that the property must in every case be partitioned by metes and bounds, if separate enjoyment could otherwise be secured according to the shares of the members. They took into consideration the nature of the asset concerned in the case, which was a managing agency, and held that for an asset of that kind, there was no other mode of partition open to the parties if they wished to retain the property and yet hold it not jointly but severalty, and that the law did not contemplate that a person should do the impossible. The contention of the Department that it was open to the members of the family to have allotted different managing agencies to different members of the family as a reasonable mode of division consistent with the requirement under section 25-A (1) was repelled. The nature of the property was taken into consideration for determining whether the mode of division adopted by the parties fulfilled the requirements of the Income-tax Law.

We are unable to see how these decisions assist the argument of the learned counsel for the assessee. It is undeniable that in this case the properties of the family consisted of movables, house properties, leasehold right of salt pans and cardamom estate, all of which are capable of actual division by metes and bounds. The circumstance that there was a declaration of the interest of each of the members of the family in the properties as one-fourth share therein does not carry us any further. After all, immediately there is a declaration of the intention to separate on the part of any member of the joint family, fractional interest in the family becomes ascertained. But that is not to say that he becomes entitled to any definite portion of the family estate. Nor does the fact that pending an actual division of the properties, the income is divided in the ratio of the shares amount to such a division in definite portions. As the decisions cited above lay down, it is only in the case of properties which by their very nature are incapable of physical division that the absence of actual division thereof is held not to offend against section 25-A.

It has further been contended that even if in the absence of the division as required by section 25-A, the Hindu undivided family has to be deemed to continue to exist as an assessable entity when once Receivers have been appointed not as representatives of the Hindu undivided family but only as representatives of the tenants-in-common, the Receivers do not realise the income on behalf of the undivided Hindu family but on behalf of the individual members of that family. Reliance is placed on clause 6 of the decree which directs the Receivers to manage the properties on behalf of the parties. Forgetting for the moment the intervention of the Receivers, when once it is found that there has been no partition of the joint family property among the various members or groups of members in definite portions it follows that for the purpose of assessment such a family shall be deemed to continue to be a Hindu undivided family. When once that conclusion is reached, we find it difficult to follow the further argument that the intervention of the Receivers make any difference to the validity of the assessment on the Hindu undivided family.

Some reliance appears to be palced upon decisions which deal with the question of an association of persons, and the present case is attempted to be brought into line with certain observations made in these decisions. In *The Estate of Khan Saheb Md. Umar Saheb* v. *Commissioner of Income-tax, Madras*[1], the Receivers appointed by Court pending a suit for partition carried on the business of the deceased owner of the property who died intestate. An assessment was made of the profits of the business in the hands of the Receivers on the basis that the profits accrued to an association of persons consisting of the heirs. The decision principally went upon the conisderation of what constituted an association of persons. It was held that neither the fact that the heirs inherited the business and owned it thereafter as co-sharers in defined

1. (1957) 2 M.L.J. 321 : I.L.R. (1958) Mad. 23 : 33 I.T.R. 767.

shares and the income belonged to the group of heirs with definite shares, with the earning of which income they had nothing to do, nor the fact that they were entitled to and did receive their share of the profits, either each separately or both taken together, constituted them an association of persons. It was further decided that to constitute an association of persons as a taxable unit, the objects of the association must be to produce income, profits or gains and that a volition to that effect should proceed from those who formed, the association. In that case, it was found that all the heirs all through wanted the Receivers to be appointed to conduct the business; there was the unity of purpose and objective between them which was sufficient to constitute them an association of persons. In another case *Indira Balakrishna* v. *Commissioner of Income-tax, Bombay*[1], a similar question came up for consideration. There, three co-widows of a deceased Hindu received income from the assets which they jointly inherited from their husband. The Department assessed them as an association of persons in respect of the entire income which arose from property, dividends, shares in a registered firm, interest on deposit and ground rent. It was decided therein that except in so far as the income from property was concerned, which property they enjoyed and managed jointly and in respect of which they should be treated as having earned the income as an association, with regard to the rest of the income, there were no acts of management on the part of the widows and they could not be regarded as an association of persons. We shall refer to this decision again when it comes to dealing with the immovable properties and the income therefrom. But here it would be sufficient to state that in so far as an assessee can be held to be liable to assessment as an association of persons, there should be definite acts of management on the part of the members constituting that association, leading to the income from the properties. The principle laid down in *Indira Balakrishna* v. *Commissioner of Income-tax, Bombay*[1], has been affirmed by the Supreme Court in *Commissioner of Income-tax, Bombay* v. *Indira Balakrishna*[2].

It is difficult to see how these decisions render any assistance to the argument advanced. It is true that the income from properties is derived on behalf of the members of the erstwhile coparcenary. But it is not the contention of the assessee that there should be an assessment on the basis of an association of persons. Nor can we see how so long as section 25-A mandatorily directs the assessment to be made as if the Hindu undivided family continued to exist, there could be an assessment in the status of an association of persons. The Income-tax Act clearly distinguishes betweeen these two classes of assessees, an association of persons and Hindu undivided family. It may be that if there has been an actual division among the members of the family subsequent to which they for purposes of easy management prefer to manage the properties as an association, such a result, *viz.*, the assessment in the status of an association of persons, may be possible. But so long as an actual division has not taken place, section 25-A (3) comes into play and cannot be avoided on the basis of any such argument as advanced above.

It is next contended that at least in so far as the immovable properties are concerned, there can and should be an assessment on the individual members. The decisions referred to above are relied upon in this regard. Section 9 (3) of the Act reads :

> " Where property is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons but the share of each such person in the income from the property as paid in accordance with this section shall be included in its total income."

The argument is that on and after the passing of the preliminary decree, the respective shares of the members of the family become definite and ascertainable. That being so, the income from these properties at least should be assessed in the hands of the members individually. It does not appear to us that this provision is

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1. (1956) 30 I.T.R. 320.

2. (1961) S.C.J. 153 : 39 I.T.R. 546.

attracted in the case of a Hindu undivided family. If it were, it should be applicable irrespective of whether there was a devision or not, for each coparcener is entitled to a definite and ascertainable share in the property according to the Hindu Law. This provision seems to our minds to have a relevance to a case where two or more persons acquire a property jointly and their shares therein are definite and are ascertainable. In the case of joint family property, however, though the share of the coparcener may be defined according to the Hindu Law, he cannot be said to own any definite part of the property. The position is no different even when there is a severance in status, but the Hindu undivided family continues to be the assessee. It is the assessee, the Hindu undivided family, that is the owner of the property for the purposes of the assessment to tax of the income from that property ; there is no plurality of owners to attract section 9 (3) of the Act. Section 9 (3) cannot to our minds override the special provision relating to the Hindu undivided family which is contained in section 25-A.

There is no doubt that the Receivers in this case were appointed by the Court. The fact that it was based on a compromise does not matter. Under section 41 of the Act, where a Receiver or Receivers is or are appointed by or under any order of Court and is or are entitled to receive on behalf of any person any income, profits or gains,

> " the tax shall be levied upon and recoverable from such . . . . Receiver . . . . in like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable and all the provisions of this Act shall apply accordingly."

The learned counsel seeks to interpret the expression 'person' found herein as relating to the several individual parties who made up the joint Hindu family. It is true that clause 6 of the decree provides that the Receivers shall manage the properties on behalf of all the parties. It is quite clear however that notwithstanding the use of this expression, the Receivers were in fact managing only the undivided family properties on behalf of the members of the disrupted joint family. In fact, not only have they been directed to realise the income from the properties but they had to do all and various things which had to be done, such as meeting the liabilities of the family debts, making provision for marriages and other expenses, making monthly allowances to the divided members of the family and such other acts. Clearly, then they were not acting on behalf of each individual member of the divided family but on behalf of what may be called the family estate. The Receivers were accordingly appointed for the purpose of receiving the income, profits and gains of the persons, who for purposes of assessment to income-tax constituted a Hindu undivided family, despite the disruption in status ; the 'person ' within the meaning of that expression in section 41 (1) of the Act whom the Receivers represented in this case, was that Hindu undivided family. The intervention of the Receivers in such circumstances did not result in their representation of persons who were no longer liable to be assessed as a Hindu undivided family but were entitled to be assessed to tax each in his individual status. Section 41 (1) in express terms directs that the tax shall be levied on the Receivers.

> " in like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable."

In this case the 'person' to be assessed, the person whom the Receivers represented, was the Hindu undivided family, and that was the only legal basis available in this case for the assessment levied on the Receivers.

We answer the first question against the assessee; section 41 (1) is mandatory. Our answer to the second question also is against the assessee ; despite the division in status the members continued under a liability to be assessed as a Hindu undivided family. We answer the third question in the affirmative and against the assessee.

The assessee will pay the costs of this reference. Counsel's fee Rs. 250.

K.L.B. ——— *Reference answered against assessee*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

Kailasa Reddiar .. *Appellant**

v.

Ponnammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 47—*Party to suit struck off under Order* 10, *rule* 2—*When could be deemed to be a party defendant for purposes of section* 47.

Whether a person who has been exonerated from a suit and has been struck off as improperly impleaded, under the provisions of Order 10, rule 2 of the Civil Procedure Code, could nevertheless be deemed to be a party defendant for purposes of section 47 of the Code is one of substance and not of form. An order exonerating a party from a suit may be made on several grounds and whether or not such a person could still be deemed to be a party for certain other purposes will depend on the circumstances of each case having regard to the pleadings and the scope of the order of exoneration.

A person exonerated as improperly impleaded and struck off, he ceased to be a party to the suit and a subsequent suit by him is not barred by section 47 of the Civil Procedure Code.

Appeal against the Decree of the Subordinate Judge, Devakottai, in Appeal Suit Nos. 94 and 93 of 1953, preferred against the Decree of the Court of the District Munsif of Manamadurai, in Original Suit Nos. 94 and 93 of 1951 respectively.

A. Sundaram Iyer, for Appellant.

T. P. Gopalakrishnan, for Respondents.

The Court delivered the following

JUDGMENT.—The only question, that was argued in these second appeals, was whether the suits out of which they arise, were barred by the provisions of section 47 of the Code of Civil Proocedure. Both the Courts below held that they were not. On that view and in the light of their findings on other questions, which do not arise now, the suits were decreed and the appeals therefrom were unsuccessful. The 1st defendant, who is common to both the suits, has come up to this Court in second appeals. The 1st defendant, on the foot of a mortgage executed by the 2nd defendant on 11th December, 1942, obtained a decree against him and in execution purchased the properties involved in both the suits and which had formed the subject-matter of the hypotheca. The 1st defendant also got delivery of the suit properties. The plaintiff filed separate applications for re-delivery of the properties but by a common order, dated 27th February, 1951, they were dismissed. The present suits have been therefore brought praying to set aside the said order. The case for the plaintiffs was that the properties involved in both the suits were the self acquisitions of one S. Perumal Asari and that the 2nd defendant, who is his son, had, therefore, no right to mortgage those properties in favour of the 1st defendant. The plaintiff in O.S. No. 93 of 1951 is the daughter's son of S. Perumal Asari and plaintiffs 1 and 2 in O.S. No. 94 of 1951 are his widow and daughter respectively. There were two other plaintiffs in the latter suit who claimed to be the alienees from S. Perumal Asari. The suits were resisted by the 1st defendant on the ground that the properties belonged to the joint family consisting of S. Perumal Asari and his son, the 2nd defendant, and that the mortgage executed in favour of the 1st defendant was for purposes binding on the family. The other defences were that the suits were barred by *res judicata* and, in any case, by the provisions of section 47, Civil Procedure Code. The Courts below concurrently found that the properties were the self-acquisitions of S. Perumal Asari and that the question whether they were such acquisitions was barred by *res judicata*. As I said, they were also of the opinion that the suits were not barred by section 47, Civil Procedure Code. The plea based on that section was raised in view of the fact that in the suit by the 1st defendant to enforce the mortgage in his favour, the 2nd defendant's father S. Perumal Asari was impleaded as a party defendant. It appears from the records

* S.A. Nos. 1050 and 1051 of 1957.

4th January, 1961.
(14th Pausa, 1882-Saka).

that the 1st defendant endorsed on the plaint exonerating S. Perumal Asari from the suit because he was claiming a paramount title. He was, accordingly, on the basis of the endorsement, struck off from the suit which ended in a decree only as against the 2nd defendant. The contention, on behalf of the 1st defendant was that notwithstanding that order S. Perumal Asari should be viewed as having continued as a party to the suit on the mortgage for purposes of section 47, Civil Procedure Code and that, therefore, the proper remedy of the plaintiffs who claimed title through S. Perumal Asari was to file an appeal against the said common order, dated 27th February, 1951 and not to agitate their rights by instituting the present suits. The Courts below did not accept this contention and Sri A. Sundaram Ayyar, the learned counsel for the appellant (1st defendant) in this Court, has reiterated the same contention before me.

The question, whether a person, who has been exonerated from the suit, continues nevertheless to be a party defendant for the purpose of section 47, is one of substance and not of form. An order exonerating a person may be rested on more than one ground. Where a person claims in a suit on a mortgage a paramount title, and he is exonerated on that ground and the title so raised was not adjudicated in that suit, it may in law amount to removal of his name from the plaint. On the other hand, there may be other circumstances on which exoneration may be rested and it may not have the same consequence of the name of the person exonerated being struck off or removed from the suit. Though an order struck off a party, all the same the Court may on particular facts hold him to continue to be a party for certain purposes. These propositions appear to be well established by authorities of this Court. Reference may be made in *Linga Aiyar* v. *Lakshumanan*[1], and *Abdul Sac* v. *Sundara Mudaliar*[2]. In the first of them in an earlier suit a person's name was struck off by consent and the question with which this Court was concerned was whether, notwithstanding the form of the order, that person should be regarded as continuing as a party to the suit for the purpose of section 47, Civil Procedure Code. It was held that it was not the form that mattered but really the substance and that looking at the substance, notwithstanding the apparent tenor of the order, the party struck off did really continue as a party to the suit for the purpose of that section. In the course of that judgment, it was pointed out by reference to an earlier Full Bench decision of this Court that in the case of misjoinder of parties, the proper procedure was the one laid down by rule 10 (2) of Order 1 of the Code of Civil Procedure, namely, to strike out the party as having been improperly impleaded. Whether a party was improperly impleaded would depend upon the particular pleadings, the reliefs asked for and other relevant circumstances. In that case it was also recognised that where a party set up a paramount title in a mortgage suit to both the mortgagor and the mortgagee and had been exonerated from the suit on the ground of misjoinder, he did not remain a party to the suit for the purpose of section 47. That principle was clearly laid down in *Krishnappa* v. *Periaswami*[3], which was approved by the Full Bench in *Abdul Sac* v. *Sundara Mudaliar*[2]. The Full Bench quoted the following passage from *Krishnappa* v. *Periaswami*[3], with approval :

"The exoneration in the present case having been on the ground of misjoinder we are of opinion that the party whose claim was not adjudicated upon does not remain a party to the suit for the purpose of section 47 of the Code of Civil Procedure. Exoneration from the suit may be due to various causes and the question whether a party remains on record for the purpose of section 47 in-spite of such exoneration will depend upon the nature and scope of the order having regard to the pleadings and the reason which led to such dismissal or exoneration. To hold that in cases of misjoinder (and consequent refusal of the Court to adjudicate upon the particular matters in contest) the party whose claim was not adjudicated upon and who was exonerated remains a party to the suit would lead to the anomaly that the Court would be bound in execution proceedings to decide the very questions which it refused to determine in the suit."

What is, however, urged by Sri Sundaram Ayyar is that the rule that a person claiming a paramount title in a suit on a mortgage is an unnecessary party, and

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1. (1925) 50 M.L.J. 387 : A.I.R. 1926 Mad. 687.
2. (1931) 59 M.L.J. 932 : I.L.R. 54 Mad. 81. (F.B.).
3. (1916) 32 M.L.J. 532 : I.L.R. 40 Mad. 964.

therefore has to be exonerated and his name struck off is not an absolute one but has exceptions and that one of them is a case of a member of a joint Hindu family raising a plea of paramount title. In other words, according to the learned counsel, the rule of exoneration based upon the ground of paramount title is applicable only to a case of a stranger and not to a member of a joint family who, though he may fail on the question of paramount title based upon an allegation of self-acquisition, may still have an interest in the hypotheca as such a member. In such a case, the learned counsel contends that a member of a joint Hindu family, notwithstanding the fact that he was raising a question of paramount title in a suit on a mortgage, could be regarded as a proper party. In support of his contention, the learned counsel invited my attention to *Kasi Chettiar* v. *Ramaswami Chettiar Firm*[1], This is what Varadachariar and Mockett, JJ., observed in that case :

> " The rule that in a mortgage action a claim by way of paramount title should be excluded is not an absolute one and a claim of self-acquisition by a member of a joint family of the mortgagor is one of the exceptions to the rule and should be tried in the interests of the auction-purchaser who may thus be enabled to know the exact situation without being put to the risk of speculation."

In that case the trial Court had declined to record a finding on the issue pertaining to the plea of a title paramount. The learned Judges did not accept that view and remanded the suit for a determination of that question and fresh disposal of the suit. In that case, the learned Judges were not concerned with the question whether, where such a member of the family of the mortgagor was, at the instance of the mortgagee, exonerated and his name struck off, he should still be regarded as continuing as a party to the suit. It seems to me that although such a member in an action on a mortgage may be permitted to raise a plea of title paramount, that does not necessarily imply that even in a case, were the mortgagee himself wanted that the member raising a plea of title paramount should be exonerated and should be struck off from the array of parties in the suit, he could still be regarded as continuing as a party to the suit for the purpose of section 47, Civil Procedure Code.

As already stated, the effect of exoneration and striking off in the context of the question whether the person concerned continued to be a party to the suit, would depend upon the particular circumstances averred in the pleadings and the scope of the order. What happened in this case was this. The 1st defendant endorsed on the plaint in the suit to enforce the mortgage in his favour that S. Perumal Asari might be exonerated. Perumal Asari was accordingly exonerated and struck off from the suit and his plea of title paramount was not adjudicated upon. Referring to this, the 1st defendant in his written statements in the present suits stated the ground for the said endorsement to be that S. Perumal Asari was claiming a title paramount and he was, therefore, not a necessary party. The exoneration of S. Perumal Asari and the striking out his name from the record, was therefore upon the ground that he was an unnecessary party. In my opinion, the Court was justified on the basis of such an endorsement in striking out S. Perumal Asari from the array of party defendants as a person improperly impleaded within the meaning of rule 10 (2) of Order 1 of the Code of Civil Procedure. The Courts below viewed the scope of the order exonerating and striking off Perumal Asari as that he ceased to be a party to the suit on the mortgage, and in my opinion, they rightly did so.

It was, therefore, properly held that the suits were not barred by the provisions of section 47, Civil Procedure Code.

The result is, the Second Appeals fail and are dismissed with costs.

No leave.

R.M. *Appeals dismissed.*

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1. (1936) 44 L.W. 706.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

A. Rangaswamy .. *Appellant**

v.

K. Govindaswamy Naidu and another .. *Respondents.*

Negotiable Instruments Act (XXXVI of 1881), *section* 4—*Promissory note—Instrument containing expression* 'கொடுக்க உள்ளவன்'—*If a promissory note.*

An unconditional undertaking to pay a certain sum of money is an indispensable statutory requisite without which no instrument in writing can be a promissory note within the meaning of the Act. Words like 'I promise to pay' or 'I do hereby undertake to pay' clearly fulfil the requirement of an unconditional undertaking to pay. Words merely acknowledging liability of the person signing the instrument to pay a certain sum of money or admitting an indebtedness on his part may not amount to unconditional undertaking to pay even if it were possible to infer an implied promise to pay on the part of the person signing the instrument. If the words of the instrument are sufficiently plain to fasten an unconditional undertaking to pay by the executant even the absence of express words to that effect cannot deprive the instrument of its true character as a promissory note. The description of the instrument, the language of the instrument taken as a whole, the circumstances under which the document came to be executed, the intention of the parties manifest from the face of the document and the surrounding circumstances have all a cumulative bearing on a proper construction of the document whether it is a promissory note or not. In the instant case it was held that the instrument using the words "'கொடுக்க உள்ளவன்'" was a promissory note which was nagotiable by endorsement.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in Original Suit No. 182 of 1955.

S. Mohankumaramangalam, V. Ramaswami and *R. Rajagopalan,* for Appellant.

N. R. Raghavachari, for Respondents.

The Judgment of the Court was delivered by

Jagadisan, J.—On 25th December, 1950, one Venkataswami Naicker, a resident of Adikarapalayam, Tiruchengode taluk, Salem district, borrowed a sum of Rs. 9,000 from A. V. Srinivasalu Naidu, a resident of Appanayakkanpatti, Palladam taluk, Coimbatore district and executed an instrument styled as a promissory note with a stipulation to pay interest at 6½ per cent per annum. On the same day Srinivasalu Naidu, in whose favour the aforesaid instrument was executed, endorsed the instrument in favour of his brother-in-law Rangaswami Naidu for valid consideration. Venkataswami Naicker died in or about November, 1954. He left behind as his heir his brother, Govindaswamy Naidu. Venkataswamy Naicker is also supposed to have executed a testament bequeathing some of his properties to one Govindarajulu Naidu. Rangaswami, the endorsee referred to above, filed the suit, O. S. No. 182 of 1955 on the file of the Court of the Subordinate Judge of Coimbatore seeking to recover the principal sum of Rs. 9,000 advanced by Srinivasalu Naidu to the late Venkataswamy Naicker together with future interest from Govindaswamy Naidu, brother of the late Venkataswami, impleaded as the first defendant in the action, and from Govindarajulu Naidu the legatee of the will by Venkataswami impleaded as the second defendant. The suit was instituted on 2nd July, 1955. The plaintiff pleaded that though the suit was laid beyond three years from the date of the borrowing it was in time as the original promisor and defendants 1 and 2 were all agriculturists entitled to the benefit of the Madras Ordinance V of 1953, Act V of 1954 and Act I of 1955.

Defendants 1 and 2 filed separate written statements in the suit. The first defendant pleaded that the late Venkataswami Naicker was his undivided brother and that the properties in his hands are all joint family properties of himself and his brother. He pleaded that the debt incurred by Venkataswami had been fully discharged by payment of cash of Rs. 5,000 on or about 2nd October, 1951, and by delivery of two electric motors of 5 horse power with pump set worth Rs. 3,000 and by delivery of 10 sirens worth Rs. 3,000. He denied that either Venkataswami

*Appeal No. 110 of 1957. 15th December, 1960.
(24th Agrahayana, 1882, Saka).

or himself was an agriculturist within the meaning of the Ordinance and the Madras Acts V of 1954 and I of 1955, and contended that the suit was barred by limitation. He also raised a further plea that the instrument executed by Venkataswami in favour of Srinivasalu Naidu was not a promissory note and was incapable of being negotiated and that therefore the plaintiff claiming to be an endorsee was disentitled to sue. The written statement filed by the second defendant raised substantially the same contentions as those found in the written statement of the first defendant.

The learned Subordinate Judge of Coimbatore held that the plea of discharge put forward by the defendants was false. He found that Venkataswami Naicker and the first defendant were agriculturists within the meaning of the Ordinance and the two Madras enactments, and that therefore the suit as against the first defendant was in time having regard to the period of exclusion for purposes of limitation found in the statutes. The second defendant was found, not to be an agriculturist within the meaning of Madras Act I of 1955 and the learned Subordinate Judge was therefore of opinion that the suit must in any event be out of time as against him. The learned Subordinate Judge took the view that the instrument executed by Venkatawami Naicker in favour of Srinivasalu Naidu was not a promissory note as defined under the Negotiable Instruments Act, and that therefore there was no valid endorsement in favour of the plaintiff. On these findings, the plaintiff was non-suited. A separate set of costs in favour of each of the defendants was also awarded. This appeal has been preferred by the plaintiff.

The discharge pleaded on behalf of the defendants cannot be true. The first defendant avoided the witness-box. The second defendant who examined himself as D.W.-2 merely deposed that he learnt that the debt had been discharged. There is no endorsement of discharge on the instrument of borrowing. On the very day when the money was lent and the instrument was executed there was an endorsement in favour of the plaintiff. It is unlikely that Venkataswami Naicker would have dealt with Srinivasalu Naidu and repaid the debt to him partly in cash and partly by delivery of articles, knowing full well that the note had been endorsed in favour of the plaintiff. The plaintiff admitted in his evidence before the Court as P.W.-2 that Venkataswami Naicker left behind a will of which he was one of the attestors. He also admitted that the will did not refer to the debt due by Venkataswami to him. On this evidence it was contended on behalf of the defendants that the suit debt must have been discharged by Venkataswami Naicker by the time he executed the will. The will has not been produced before the Court. The learned counsel for the respondents appearing before us submitted that the date of the will was March, 1951. Even according to the first defendant the payment of cash of Rs. 5,000 was only on or about 2nd October, 1951. It is thus obvious that no significance can be attached to the non-mention of the debt in the will executed by Venkataswami. The mere fact that the plaintiff chose to give up past interest on the debt and refrained from filing the suit till 1955 cannot have any bearing on the truth or otherwise of the plea of discharge put forward by the defendants. We agree with the learned Subordinate Judge that the defendants failed to prove that the suit debt was discharged.

P.W.-2 the plaintiff deposed that Venkataswami Naicker was an agriculturist, in cross-examination he stated that he did not enquire what would be the value of the lands included in the will of Venkataswami. The second defendant has not chosen to produce it obviously because if produced it would disclose the agricultural lands owned by the late Venkataswami. The second defendant deposed that he knew that there were partition disputes between the first defendant and the late Venkataswami, and that he also knew that Venkataswami had filed a suit for partition but that he did not know whether agricultural lands and house were included in that suit. We agree with the learned Subordinate Judge that there is ample proof on record to enable the Court to hold that Venkataswami was an agriculturist within the meaning of Ordinance V of 1953 and Madras Act V of 1954.

It was next contended that Venkataswami or his heirs and legal representatives were not agriculturists within the meaning of Act I of 1955 because of the assess-

ment to property tax after 1952-53 of one of the buildings owned by Venkataswami on an annual rental value of Rs. 600. This assessment to property tax according to the learned counsel for the respondents operated as a bar to any claim for exemption of the period of limitation under Madras Act I of 1955.

The evidence in support of the assessment of property tax consists of Exhibit B-1 stated to be a certificate issued by the Secretary of the Village Uplift Association dated 29th December, 1955, and the oral testimony of the Secretary himself as D.W. 1. The certificate Exhibit B-1 cannot be implicitly relied upon as its contents are somewhat of a tell-tale character. D.W. 1 admitted in the witness-box that there is a rent deed evidencing the lease of the property in favour of the Village Uplift Association. The rent deed is of course not produced. He further admitted that the original rent deed is with the Treasurer of the Association. If the second defendant was receiving a rent of Rs. 55 per month for the building from the Village Uplift Association as is now sought to be made out the best evidence in the matter will be the rent deed. Further there is no evidence on record to show that any assessment was levied upon this property by the Panchayat Board on the annual value of Rs. 600 and more. It is only such an assessment made against a person that would deprive him of his character as an agriculturist within the meaning of Act I of 1955. We agree with the learned Subordinate Judge that both Venkataswami and the first defendant were agriculturists entitled to the benefit of the exemption from limitation for the period specified in Ordinance V of 1953 and Madras Acts V of 1954 and I of 1955.

The second defendant was an income-tax assessee. Exhibit B-6 is the assessment order relating to him for the year 1953-54. He is therefore taken out of the category of agriculturists as defined under Act I of 1955. The plaintiff will not be entitled to exclude any period as per the terms of the Madras Act I of 1955 in computing the period of limitation for filing the suit against the second defendant. The suit is, therefore, clearly barred by limitation as against the second defendant.

The next question that has to be considered is whether Exhibit A-1 dated 25th December, 1950, executed by Venkataswami Naicker in favour of A. V. Srinivasalu Naidu is a promissory note as defined by section 4 of the Negotiable Instruments Act. The promissory note is in Tamil and the relevant recitals therein have to be referred to. They are as follows :

மூபலகு, ஒன்பதாயிர ரூபாய்க்கு மாதம் ஒன்றுக்கு நூத்துக்கு 0-8-4 எட்டணா நான்கு பைசாவீதம் வட்டி சேர்த்து கூடிய வட்டியும் முதலும் தாங்கள் வேண்டும்போது தங்களுக்காவது தங்கள் உத்தரவுபெற்றவர்களுக்காவதும் கொடுக்க உள்ளவன்.

The translation of the document into English made by the Court is as follows :

"Promissory note executed on 25th December, 1950 in favour of A. V. Srinivasalu Naidu. . . . by me Venkataswami Naicker . . . . . For my urgent necessity the sum received this day in cash from you as loan is Rs. 9,000. On demand, I promise to pay to you or order the sum of Rs. 9,000 with interest at Rs. 0-8-4 per month per Rs. 100.

(Signed on four one anna revenue stamps)
M. K. Venkataswami."

The tamil words *கொடுக்க உள்ளவன்* have been translated as 'I promise to pay'. The learned Subordinate Judge has taken the view that the words *கொடுக்க உள்ளவன்* can only mean that the executan is liable to pay the amount. In this view of the matter he held that there was no undertaking to pay in Exhibit A-1 and that therefore one of the essential requirements of a promissory note as defined under the Act was not present.

Section 4 of the Negotiable Instruments Act is as follows :

"A 'promissory note' is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

An unconditional undertaking to pay a certain sum of money is an indispensable statutory requisite without which no instrument in writing can be a promissory

note within the meaning of the Act. What words would amount to an unconditional undertaking to pay is really a matter of construction of the language employed in any instrument. Words like 'I promise to pay' or 'I do hereby undertake to pay' clearly fulfil the requirement of an unconditional undertaking to pay. When these words occur in any instrument there will not be any difficulty in holding it to be a promissory note if the other requisites of the statute are fulfilled. Words merely ackowledging liability of the person signing the instrument to pay a certain sum of money or admitting an indebtedness on his part may not amount to an unconditional undertaking to pay even if it were possible to infer an implied promise to pay on the part of the person signing the instrument. If the words of the instrument are sufficiently plain to fasten an unconditional undertaking to pay by the executant even the absence of express words to that effect cannot deprive the instrument of its true character as a promissory note. The description of the instrument as a promissory note, the language of the instrument taken as a whole, the circumstances under which the document came to be executed, the intention of the parties manifest from the face of the document and the surrounding circumstances have all a cumulative bearing on a proper construction of the instrument, whether it is a promissory note or not.

The learned Subordinate Judge relied upon two decisions of this Court in holding that Exhibit A-1 is not a promissory note as defined by section 4 of the Act. The first decision is that reported in *Tirupathi Goundan* v. *Rama Reddi*[1]. In that case a debtor signed and delivered to his creditor an unstamped document as follows :

"The account executed on. . . . . by . . . . to . . . . The amount which I have this day received from you in cash is Rs. 700. This sum I am bound to pay you. Therefore adding to this sum interest at 8 annas per cent per mensem, I am liable to pay. This is the account in this manner executed with my consent."

The suit was laid to recover the money lent as evidenced by the document. The question was whether the document was a promissory note within the meaning of section 4 of the Negotiable Instruments Act or a mere acknowledgment of liability falling under Article 1 of Schedule I of the General Stamp Act. A Division Bench of this Court consisting of Subramania Ayyar and Benson, JJ., observed thus :

"The only question is whether the words therein 'I am liable to pay' can be held to be an 'undertaking' to pay within the meaning of section 4 of the Act. The construction depends on the actual words used rather than what their effect may be as regards the rights of the parties. Examining the document in this light, we are of opinion that the words do not amount to an undertaking to pay, but constitute only an acknowledgment of liability to pay."

We do not know what the exact Tamil equivalent of the words 'liable to pay' occurring in the document forming the subject-matter of the decision cited above was. We regard the decision as one turning upon the language of the instrument which came to be considered by their Lordships. In the matter of interpretation of documents there cannot be any such thing as a binding precedent as the language of no two instruments can exactly be the same.

The second case relied upon by the Court below in support of its conclusion is the decision in *Vaidinatha Chettiar* v. *Tirumalai Reddiar*[2]. The words of liability occurring in the document which was considered in that decision were கொடுக்க உள்ளவன். Krishnan Pandalai, J., followed the decision in *Tirupathi Goundan* v. *Rama Reddi*[1], and construing the Tamil words as meaning only an admission of liability held that the instrument in question was not a promissory note. At page 316 the learned Judge observed as follows :

"On the first point as to what Exhibit A really amounts to, the learned Judge has referred to a decision in *Tirupathi Goundan* v. *Rama Reddi*[1], where, as in this case, instead of the usual undertaking which should be contained in a promissory note 'I shall pay or I undertake to pay etc.' the words of liability were 'I am liable to pay', a Bench of this Court held that such an instrument does not contain any undertaking to pay and so held it was not a promissory note. No doubt another Bench in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[3] reserved their opinion about this case but neither they nor any other Bench has overruled it or dissented from it. Although, if I were competent, I would have my own views on the subject, I am bound by this decision."

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1. (1897) 7 M.L.J. 291 : I.L.R. 21 Mad. 49.
2. (1933) 66 M.L.J. 315.
3. (1913) 26 M.L.J. 19 : I.L.R. 38 Mad. 660.

In *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[1], Sadasiva Iyer, J., expressed a doubt regarding the correctness of the decision in *Tirupathi Goundan* v. *Rama Reddi*[2]. In that case a varthamanam letter was as follows :

" Amount of cash borrowed of you by me is Rs. 350. I shall in two weeks ' time returning this sum of Rs. three hundred and fifty with interest thereon at the rate of rupee one per cent per month, get back this letter."

A Division Bench consisting of Sadasiva Iyer and Spencer, JJ., held that the varthamanam letter contained an unconditional undertaking to repay the borrowed money and was therefore a promissory note. Referring to *Tirupathi Goundan* v. *Rama Reddi*[2], Sadasiva Iyer, J., observed as follows :

" As regards *Tirupathi Goundan* v. *Rama Reddi*[2], the language of the document in question in that case was quite different and very vague. Even so, I wish (with the greatest respect to the Judges who decided it) to be permitted to reserve my opinion if a document similarly worded happens to come before me for interpretation."

In *Karuthappa Rowthan* v. *Baoa Moideen Sahib*[3], the instrument which came to be considered was as follows :

" Promissory note executed on. . . . . in favour of. . . . . by. . . . . In the matter of the purchase of piece-goods by me from your shop on the date, the sum found due by me as per patty (list) is Rs. 600. . . . . which sum I promise to you or to your order on demand with interest at 1¼ per cent. To this effect. . . . ."

The Division Bench consisting of Sundara Ayyar and Phillips, JJ., held that the instrument was a promissory note and not a mere recital of liability. Their Lordships observed thus :

" It is no doubt true that the question whether an instrument is a promissory note or not should be judged by the words used, and that the instrument must contain in words an unconditional undertaking to pay a sum of money, and it is not enough that the substantial effect of the instrument should be to make the executant liable to pay a sum of money. . . . . . Several cases have been cited by the learned Advocate-General viz., *Tirupathi Goundan* v. *Rama Reddi*[2], *Govind* v. *Balwantrao.*[4] *Horne* v. *Redfearn*[5] and *White* v. *North*[6] in support of his argument. But in all these cases there was no language of promise to pay a sum of money. There was an acknowledgment of receipt of money or of indebtedness and an admission that the executant was accountable to the other party."

We shall now refer to two decisions of the Judicial Committee. The first is that in *Mohammad Akbar Khan* v. *Attar Singh*[7]. Referring to the definition of a promissory note as contained in the Act the Judicial Committee observed thus :

" It is indeed doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be inferred from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice, for the third illustration indicates that an IOU is not a promissory note, though of the implied promise to pay there can be no doubt. The second illustration however seems to show that the express words ' I promise ' or ' I undertake ' are unnecessary. The form of words is taken from an early English case, *Casborne* v. *Dutton*[8], where according to the learned author the Court stated that the words ' to be paid ' in the document there sued on amounted to a promise to pay : observing that the same words in a lease would amount to a covenant to pay rent. It does not appear to form a useful general illustration except in the case of a document in that particular form of words."

" Their Lordships prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within a definition relating to documents which are to be negotiable instruments."

The other decision of the Judicial Committee is that in *Karam Chand* v. *Firm Mian Mir Ahmad*[9]. Sir George Lowndes delivering the Judgment of the Board observed thus at page 123 :

" But since the Judgment of the Judicial Commissioner's Court, a decision of this Board *Mohammed Akbar Khan* v. *Attar Singh*[7] has made it clear that the shadow resting upon these exhibits throughout the case was unreal ; that documents of this nature which were clearly never intended to be negotiable instruments at all are not promissory notes and are not therefore, for want of a stamp, inadmissible in evidence."

In *Sibree* v. *Tripp*[1], a memorandum was to this effect :

"*Memorandum*—Mr. Sibree has this day deposited with me £500, on the sale of £10,300 3 per cent. Spanish, to be returned on demand— 'James T. Tripp'."

1. (1913) 26 M.L.J. 19 : I.L.R. 38 Mad. 660.
2. (1897) 7 M.L.J. 291 : I.L.R. 21 Mad. 49.
3. (1911) 24 M.L.J. 513 : I.L.R. 36 Mad. 370.
4. (1897) I.L.R. 22 Bom. 986.
5. 4 Bing N.C. 433.
6. (1849) 3 Exche. Rep. 689 : 154 E.R. 1022
7. (1936) 71 M.L.J. 712: L.R. 63 I.A. 279: I.L.R. 17 Lah. 557 (P.C.).
8. Selwyn N. P. 11th Ed., page 401.
9. A.I.R. 1938 P.C. 121 : 42 C.W.N. 989 (P.C.).

On this document being tendered in evidence stamped with an agreement stamp, it was objected for the defendant that it amounted to a promissory note, and required a stamp accordingly. The Lord Chief Baron overruled the objection, and received the paper in evidence. At page 29 Pollock, C.B., stated the law thus :

"On consideration of the authorities cited, it appears to me that the memorandum did not amount to a promissory note. It is difficult to lay down a rule which shall be applicable to all cases ; but it seems to me that a promissory note, whether referred to in the statute of Anne or in the text books, means something which the parties intend to be a promissory note. We cannot suppose that the legislature intended to prevent parties from making written contracts relating to the payment of money, other than bills and notes ; and this appears to me to be merely an instrument recording the agreement of the parties in respect of a certain deposit of money....."

In S.A. No. 1540 of 1959, Balakrishna Ayyar, J., construed the words "செலுத்த உள்ளவன்" in an instrument described as promissory note as an undertaking to pay in the context of the other words in it. With respect, we agree with that decision.

We are of opinion that the intention of the parties to Exhibit A-1 was to bring into existence a promissory note in respect of the transaction between them. In the context of the other words occurring in Exhibit A-1 the words கொடுக்க உள்ளவன் can be translated as 'I promise to pay'. As pointed out already the English translation made by the Court in the present instance adopts the phrase' 'I promise to pay' as being equivalent to கொடுக்க உள்ளவன். Exhibit A-1 in our opinion containss an unconditional undertaking to pay as required by section 4 of the Negotiable Instruments Act and that therefore it is a promissory note. Tne piaintiff was therefore a valid endorsee of the note aud was entitled to sue upon it.

The Judgment and Decree of the Court below are set aside, and there will be a decree in favour of the plaintiff against the first defendant for recovery of the suit amount as prayed for with costs both here and in the Court below. As the suit is barred by limitation against the second defendant, the judgment and decree of the Court below dismissing the suit as against the second defendant will stand. The second defendant will not be entitled to any costs here or in the Court below.

V.S. ——— *Appeal allowed in part.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE GANAPATIA PILLAI.

Messrs. Swami Motor Transport (Private) Ltd., by its Managing Director T. A. Rathnam Pillai .. *Appellant**

v.

Messrs. Raman and Raman (Private) Ltd., by its Managing Director, P. S. Narayana Iyer and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 43-A (1) and (2) and section 47—Application for variation of route rejected by the Regional Transport Authority—Revision before the Appellate Tribunal—Pending revision Government Order directing the Regional Transport Authority to grant the variation—Order of the Appellate Tribunal allowing the revision and granting variation—Order vitiated by the Tribunal taking into consideration the Government Order—Government Order itself is invalid—Constitution of India (1950) Article 226—Petition under —Applicant if an aggrieved person—Principle.—Tribunal taking irrelevant matters into consideration—Effect.

The appellants applied on 4th January, 1956, for a variation of the route for their two buses. There were successive notifications under the Act published to one of which Raman and Raman also made a representation urging that there was no need for such a variation. On 26th July, 1950 the R.T.A. rejected the applications for variation of the route. The appellants applied to the State Transport Appellate Tribunal for a revision of the order of the R.T.A.. Meanwhile on the written representations of two members of the Legislative Assembly to the Minister of Transport and on a peti-

1. (1846) 15 Meeson and Welsbury's Rep. 23 : 153 E.R. 745.

* W.A. No. 125 of 1957.

29th July, 1960.
(7th Sravana, 1882, Saka).

tion by the Appellant himself to the Minister of Transport to extend the route by granting the variation (neither of which contained a reference to the application made by the Appellant before the R.T.A.) the Government passed the G.O. Ms. No. 3199, dated 16th November, 1956 directing the R.T.A. to grant the variation of the route. Raman and Raman filed W.P. No. 18 of 1957 to quash the G.O. Ms. No. 3199. But it was dismissed on 2nd April, 1957. On 13th May, 1957 the Appellate Tribunal allowed the revision petition filed by the appellant by granting the variation of the route. Raman and Raman applied under Article 226 of the Constitution to quash the order of the Appellate Tribunal.

Held : A representation was filed by Raman and Raman opposing the grant of variation, when the notification under section 47 of the Motor Vehicles Act was published. Even assuming that technically it was necessary for Raman and Raman to have made a representation at each stage with reference to each notification, there can be no doubt that substantially they did make a representation opposing the variation. They were also allowed to put forward their view before the Appellate Tribunal. They also moved the High Court under Article 226 of the Constitution to quash the G.O. Ms. No. 3199. They are certainly persons aggrieved for invoking the aid of Article 226 of the Constitution to quash the order of the Appellate Tribunal.

The true principle is to determine whether the applicant has an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered.

Rex v. *Richmond* confirming *Ex parte Howitt*, L. R. (1921) 1K.B. 248. referred.

The Appellate Tribunal was invested with appellate and revisional powers in respect of orders by the R.T.A. It was not a mere administrative or exeutive body. It should only deal with what may be generally described as evidence on record ' though it may be that the Tribunal is not governed by the sections of the Indian Evidence Act. It was the duty and function of the Tribunal to come to a decision on the materials on record which had been placed before the R.T.A. which was the subject-matter of the revision petition before it. Where it is obvious from a reading of the Tribunals order that it attached importance to the fact that the Government in the G.O. Ms. No. 3199 had taken a particular view of the very question which he had to decide, the order of the Tribunal would be improper.

If among several matters taken into consideration there is a matter which is irrelevant or extraneous and the Tribunal must have been influenced by such irrelevant or extraneous matter also, then the order must be set aside because it cannot be determined what the Tribunal would have held if such matter had been excluded.

G.O. Ms. No. 3199, dated 15th November, 1956 is also not a valid or proper order. Though the Government Order cannot be said to be not in accordance with the provision in section 43-A (1) in the circumstances of the case the power has been used to compel a quasi-judicial body like the R.T.A. to dispose of a case in a particular way. Where the Government were presumably aware that a competent authority had rejected the application for variation and revision petition was pending before the State Transport Appellate Tribunal order is made without reference to these material particulars in effect the Government Order has purported to forestall any decision by the Appellate Tribunal adverse to the application for variation. The Government Order was also one passed without giving an opportunity to Raman and Raman.

The order of the Appellate Tribunal is vitiated by a manifest error of law in not only taking into account an irrelevent or extraneous matter in coming to a decision, but also which was illegal and invalid and is liable to be quashed.

The view expressed by Rajagopalan, J., that the Government have no power under section 43-A(2) to specify the number of buses to ply on a new route or an existing route as extended by them dissented from.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. P. Rajagopalan, Officiating Chief Justice, dated 8th November, 1957 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 467 of 1957 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in R.No. 47986/A3 of 1956 on the file of the State Transport Appellate Tribunal, Madras and quash the order dated 13th May, 1957 and made therein.

G. R. Jagadisan and *T. R. Ramachandran*, for Appellant.

M. K. Nambiar, *M. Natesan* and *V. Ramaswami* for the Additional Government Pleader (*M. M. Ismail*), on behalf of Respondents.

The Honourable Mr. Justice Panchapakesa Ayyar and the Honourable Mr. Justice Basheer Ahmed Sayeed having differed in opinion, made the following Order of reference for the decision of a third Judge :—

Basheer Ahmed Sayeed, J.—I have had the benefit of perusing the judgment just now delivered by my learned brother and with all due respect, I regret I am unable to agree with my learned brother in the conclusions arrived at by him.

This appeal is against the Order of Rajagopalan, J., in W.P. No. 467 of 1957. The 3rd respondent in the said Writ Petition is the appellant. Though the facts have

been set out in great detail by my learned brother, still I would like to set them out in my own way.

The appellant, Messrs. Swamy Motor Transport (Private) Ltd., Tanjore, is one of the bus operators in the District of Tanjore. He was operating 11 buses on the route between Tanjore and Kumbakonam, *via*, Papanasam, a distance of 25 miles. Another operator, Sri Rama Vilas Service (Private) Ltd., was operating as many as six buses on the same route, Tanjore to Kumbakonam. The first respondent in this appeal, Messrs. Raman & Raman (Private) Ltd., is another operator who was operating 10 buses on the route between Kumbakonam to Tiruvarur *via* Kodavasal and Rama Vilas Service was also plying 4 buses on this latter route. While the distance of the route between Tanjore and Kumbakonam is 25 miles, the distance of the route between Kumbakonam and Tiruvarur *via* Kodavasal is 24 miles. Some years ago, the Respondent is said to have plied some buses between Kodavasal and Koradachery a distance of seven miles, as shown in the plan furnished by the parties, but had ceased to do so since 1943. Sometime in 1955 the Respondent applied to the Regional Transport Authority for sanction of a route between Kodavasal and Koradachery and for grant of a permit to ply a bus on the said route. It is stated that the present appellant intervened and objected to the proposal. As could be gathered from the report made by the Deputy Transport Commissioner State Transport Authorities, to the Secretary to Government, Home Department, Fort St. George, Madras, in No. Lr. 33853-E. 2/56, dated 19th October, 1956, this application was rejected after notification of the application under section 57 (3) of the Motor Vehicles Act by the Regional Transport Auhority under the following resolution dated 16th April, 1956.

" Heard the applicant. This has already been considered on 30th December, 1955 and was not recommended due to Divisional Engineer (High Ways) conditional recommendation and the applicant also agrees with this view now. Hence rejected. "

The Respondent thereupon appealed on 25th May, 1956, to the State Transport Appellate Tribunal against the decision of the Regional Transport Authority. The State Transport Appellate Tribunal, in its order, R. No. 24344/A-2/56, set aside the order of the Regional Transport Authority dated 16th April, 1956 and remanded the matter for fresh disposal in the light of the observations made by the State Transport Appellate Tribunal. It is now stated that the Regional Transport Authority heard the matter on remand and, once again, rejected the application of the Respondent for the new route, Kodavasal to Koradachery and refused to grant a permit therefor. Apparently, further proceedings in respect of this order of the Regional Transport Authority have not yet terminated. We are not, however, concerned with these pending proceedings in this appeal.

On the 4th of January, 1956, the Appellant before us applied to the Regional Transport Authority for grant of a variation of the route, Tanjore to Kumbakonam *via* Papanasam into a route, Tanjore to Koradachery *via* Kumbakonam and Kodavasal and for a permit in respect of his two buses, namely, M.D.O. 1081 and M.D.O. 1100. These two buses were among the 11 buses that were being plied by the Appellant on the route, Tanjore to Kumbakonam *via* Papanasam. This application appears to have been notified straightway under section 57(3) of the Motor Vehicles Act on the 6th of April, 1956. This notification was however cancelled subsequently and on the 14th March, 1956, the application of the Appellant was notified under section 47 of the Motor Vehicles Act. The procedure to be observed in respect of notifications under this section has been provided by way of Standing Orders in the shape of G.O. Misc.4912, Home, dated 18th December, 1950, and G.O. Ms. No. 382, dated 3rd February, 1956, apart from what is contained in the section itself. To this notification under section 47 of the said Act the 1st Respondent preferred an objection on the 30th March, 1956. By a resolution dated 21st May, 1956, the Regional Transport Authority decided to drop the proposal for the variation or extension of the route. It is not necessary to extract the terms of the resolution here but the admitted fact is that this resolution was not communicated to any of the parties concerned, it being conceded by both sides as held by

a series of decisions that the ground for such non-communication of the resolution passed under section 47 of the Motor Vehicles Act being that an order passed under section 47 was purely an administrative one and was not one which decided the rights or claims of any of the parties concerned. Such a decision on the rights or claims of the parties which alone is a judicial one is made only after the entire procedure under section 57 is gone through. It has also been held that the procedure under section 47 is merely to decide whether or not it is necessary in the interests of the public to vary or extend any route without reference to any particular operator; whereas the procedure under section 57 is with a view to decide which operator is to be given the variation of route in respect of which buses, if the proposal to vary or extend is approved of and the order passed is a judicial one.

A point was taken in the course of arguments before us that when there was no recommendation made by the Regional Transport Authority as to the opening of a new route or of an extension of an existing route under section 47 and when the proposal had not received the approval of the Transport Commissioner, as required by the G.Os. referred to above, the Regional Transport Authority could not have the power further to consider the grant of a permit or variation of a permit for a new route or extension of a route respectively. It may be stated that this point is not quite relevant to the issue before us, for even if the Transport Authority decided not to recommend the proposal and did not obtain the sanction of the Transport Commissioner, it does not absolve it from the obligation to notify the application, to receive objections and to hear parties under section 57 before the application is disposed of. The action under section 47 being only exploratory and advisory, the orders of Government in this behalf are not mandatory in their effect.

Thereafter on the 31st May, 1956, the Regional Transport Authority notified the application of the appellant for extension or variation of the route under section 57(3) of the Motor Vehicles Act, fixing the date for receipt of objections from the interested parties. It is common ground that while Sri Rama Vilas Service, Kumbakonam, put in an objection to the application of the appellant for grant of extension of route, Tanjore to Kumbakonam *via* Papanasam up to Koradachery *via* Kodavasal, the Respondent did not choose to file any such objection to the said application of the appellant notified on the 31st May, 1956. This failure on the part of the 1st Respondent it was sought to be explained by learned counsel, Mr. Nambiar for the 1st Respondent, was due to the reason that notwithstanding the fact that the first respondent was a registered bus operator having paid the prescribed fee, and on that account entitled to receive copies of all notifications from the Regional Transport Authority, he did not receive a copy of the notification in question and hence could not put in his representation. This argument is not convincing and it is also being put forward only in this Court and without any material in support therefor. It transpires that a mahazar from the village of Kamugakudi, the first signatory thereto being one Sri Jagannadha Vandayar, was also received by the Regional Transport Authority. At the hearing held on the 26th of July, 1956, the Regional Transport Authority passed the following resolution:—

"Heard the parties. Koradacheri is connected by rail with Tanjore and existing road facilities between Kumbakonam and Kodavasal are adequate. The proposed variation is not the best method of providing traffic facilities betwen Koradacheri and Kodavasal in the public interest. Hence the application is rejected."

The resolution was signed by the Regional Transport Authority only on the 29th July, 1956, as could be seen from the copy of the resolution furnished to this Court. This resolution is said to have been communicated to the appellant only on the 10th of August, 1956. It transpires however that even long prior to the resolution of the Regional Transport Authority dated 29th July, 1956, rejecting the application of the appellant for extension of the route in question, Sri Varadan, M.L.A. and Sri M. D. Thyagaraja Pillai, M.L.A. had petitioned to the Minister for Transport, Government of Madras, urging upon the Minister to examine and consider the question of providing through transport facilities between Tanjore to Koradachery *via* Kumbakonam and Kodavasal in the one case and for providing

through transport facilities between Kumbakonam to Koradachery and Tanjore to Nagapattinam *via* Kodavasal in the other, for the benefit of the travelling public, so that the public may have easy and quick mode of transport. The petition of Sri Varadan, M.L.A., appears to have been received by the Minister on 18th July, 1956, while the petition of Sri Thyagaraja Pillai, M.L.A., who is also said to be the President of the District Congress Committee was received on the 15th July, 1956. On the 6th August, 1956, the appellant also sent in an application to the Ministry of Transport, Madras, under section 43-A (2) as amended by the Madras Act XXXIX of 1954. In his petition the appellant prayed that the Government may be pleased to take the facts and circumstances mentioned in his petition into account and to direct the Regional Transport Authority, Tanjore, for extending the existing service performed by buses Nos. M.D.O. 1081 and 1100 between Tanjore-Kumbakonam, to Koradacheri *via* Kodavasal and for such further or other order as may seem fit and the nature of the case may require.

The facts set out in all these three petitions referred to above only go to establish the pressing need that existed, at the time for providing easy, quick and through transport facilities between Tanjore and Koradachery *via* Kumbakonam and Kodavasal on the one hand, and Tanjore and Nagapattinam *via* Koradacheri on the other. Whether or not the petitions of Sri Varadan and Sri. Thyagaraja Pillai were instigated by the Appellant is not relevant in the present context and there is also no evidence whatever to prove that these two members of the Legislative Assembly made representations to the Minister for Transport at the instance of or for the benefit of the Appellant. Therefore, it would only be fair to assume that the two members of the Legislative Assembly have been acting on their own behalf and in the interest of the generality of the travelling public whom they had the privilege to represent in the Assembly. It is significant however to note that these petitions were made very much prior to the decision of the Regional Transport Authority, rejecting the application of the Appellant for extension of the route and even before the decision of the Regional Transport Authority was communicated to the appellant himself. It is also obvious that these two members of the Legislative Assembly and the appellant were moving the Government only under section 43-A (2) of the Motor Vehicles Act, though the petitions of the M.L.As. in terms did not say so, whereas the petition of the appellant makes it quite clear that his petition was only under section 43-A (2) of the Act.

Mr. Nambiar called in question the propriety of the two M.L.As. making representations and the Appellant himself petitioning to the Government and the Government entertaining such a petition from the Appellant. I am unable to see any impropriety in the action taken by the members of the Legislature or by the Appellant or in the Government entertaining such representations and petitions when made to it, in the circumstances then existing. I shall revert to it at a later stage.

On receipt of the said two petitions from the two members of the Legislative Assembly and from the appellant, the Government of Madras called for a report from the Deputy Transport Commissioner, the State Transport Authority, as to the need for extension of the route as Tanjore to Koradachery. After investigating into the representations made by the two M.L.As. and the appellant, the Deputy Trnaport Commissioner, State Transport Authority, Egmore, Madras, submitted a report to the Secretary, Home Deportment, Fort Saint Geroge, Madras, No. Lr. 33853 E/2/56 dated 19th October, 1956. The entire history of the case was also set out in the report of the Deputy Transport Commissioner. At the conclusion of his report the Deputy Transport Commissioner made the following submissions :—

"Thus from the above it will be seen, that Sri Varadan, Member of the Legislative Assembly and Sri M.D. Thiyagaraja Pillai, Member of the Legislative Assembly, and Sri Swami Motor Transports (Private) Ltd., Tanjore, have stressed the need for providing transport facilities between Tanjore and Koradacheri (*via*) Kumbakonam and Kodavasal. If the contention that there should be direct transport facilities between Tanjore to Koradacheri (*via*) Kumbakonam and Kodavasal is to be conceded, then this can be achieved only by opening of a new route from Tanjore to Koradachery *via* Kumbakonam and Kodavasal.

In the circumstances, the Government may be pleased to decide the issue. "

It will be seen from this report that the only issue that had to be decided by the Government was whether or not provision should be made for direct transport facilities between Tanjore and Koradachery *via* Kumbakonam and Kodavasal by the opening of a new route from Tanjore to Koradachery *via* Kumbakonam and Kodavasal.

It is true that when the Government considered the said representations of the two M.L.As., and the appellant and the report of the Deputy Transport Commissioner, the Appellant had not mentioned about the rejection of his application for an extension of the route by the Regional Transport Authority for the obvious reason that he had no notice of it when he filed his petition. The Deputy Transport Commissioner however had brought to the notice of the Government, not only the rejection of the Appellant's application for extension of the route between Tanjore and Kumbakonam but, also the pendency of the revision petition which had by then been preferred by the appellant before the State Transport Appellate Tribunal. Even so, the Appellant, it has to be fairly stated, could not have mentioned the pendency of any revision petition dated the 10th September, 1956 preferred by him before the State Transport Appellate Tribunal in his petition before the Government dated 6th August, 1956 for much the same reason, namely, that at the time he petitioned to the Government under section 43-A (2), he had not received any communication from the Regional Transport Authority about the rejection of his petition. It is worth repetition that his application as stated already before the Government was on the 6th August, 1956, whereas the rejection of his application was communicated to him by the Regional Transport Authority only on the 10th August. So also, at the time he filed the revision before the State Transport Appellate Tribunal, the Government had not yet issued the G.O., namely, 3199, Home Department, dated 16th November, 1956, and he could not have also made any reference to the said G.O. in his revision petition before the State Transport Appellate Tribunal, for while the revision petition was filed on the 10th September, the G.O. was passed only on the 16th November. All arguments based on such failure of the Appellant against the validity of the Government Order, namely, the G.O. No. 3199, dated 16th November, 1956, seem to me to be only futile and without substance.

After taking into consideration the representations made by the two M.L.As. and the appellant and the report of the Deputy Transport Commissioner with reference to the conditions specified in section 47 of the Motor Vehicles Act, the Government passed the G.O.Ms.No.3199, dated 16th November, 1956, impugned in W.P. No.18 of 1957. This G.O. was passed without hearing any of the parties but solely on the representations before the Government and the report of the Deputy Transport Commissioner. The operative portion of the said G.O. is in the following terms :—

"In exercise of the powers conferred by section 43-A (2) of the Motor Vehicles Act, 1939, (Central Act IV of 1939) the Government of Madras hereby directs the Regional Transport Authority, Tanjore, to vary the existing route Tanjore to Kumbakonam as Tanjore to Koradachery *via* Kumbakonam and Kodavasal in respect of two buses. "

This G.O. appears to have been communicated only to the Transport Commissioner, Madras, the Regional Transport Authority, Tanjore, the Regional Transport Officer, Tanjore, Sri Varadan, M.L.A., Kumbakonam, Sri M.D. Thyagaraja Pillai, M.L.A., Koradachery, Tanjore, and M/s. Swami Motor Transports (Private) Ltd., Marunthattangudi Post, Tanjore. This was because all these parties having made representations were entitled to know their final disposal by the Government. The 1st Respondent was not a party to the proceedings before the Government, as he had made no representations to the Government and so no copy was communicated to him. The Government was not compelled by any provisions of law to issue a copy to the 1st Respondent.

In the meanwhile, a month after, the resolution of the Regional Transport Authority dated 29th July, 1956 was communicated to the Appellant, the Appellant

preferred the revision before the State Transport Appellate Tribunal dated 10th September, 1956. It may be noted that at the time the G.O.Ms.No.3199, dated 16th November, 1956, was passed by the Government, the revision filed by the Appellant before the State Transport Appellate Tribunal was actually pending. This revision petition, it is seen from the proceedings of the State Transport Appellate Tribunal, was once returned and later represented by the Appellant on the 10th October, 1956. It is to be observed that Sri Rama Vilas Service (not before us) also made a representation on the 27th November, 1956, to the State Transport Appellate Tribunal against the revision petition of the Appellant before the State Transport Appellate Tribunal. But so far as the 1st Respondent is concerned, he did not make any representation against the revision petition of the Appellant until so late as 4th December, 1956. It is conceded by Counsel on both sides that this representation of the Respondent to the State Transport Appellate Tribunal against the revision filed by the Appellant was beyond the prescribed time. It has, however, to be remembered that this belated representation made by the Respondent was, nevertheless, taken into consideration by the State Transport Appellate Tribunal, when it considered and passed the order in favour of the Appellant in its proceedings dated the 13th May, 1957, now impugned in W.P.No. 467 of 1957 and out of which this appeal has arisen. It is also to be noted that while the Appellant had preferred his revision petition before the State Transport Appellate Tribunal long before the G.O. dated the 16th November, 1956, was passed by the Government, both Sri Rama Vilas Service (Private) Ltd. and the present 1st Respondent had preferred their objections to the revision petition of the Appellant only long after the G.O. was issued by the Government. It must be presumed that both had knowledge of the G.O. in the ordinary course of events.

After the issue of the G.O. Ms.No.3199, dated 16th November, 1956 the Appellant is said to have presented a fresh application on the 19th November, 1956, to the Regional Transport Authority to grant him variation of the conditions of the permit for two other buses of his, namely, MDO Nos. 1959 and 1960. That application seems to have been notified by the Regional Transport Authority on the 19th February, 1957, under section 57 (3) of the Act. The 1st Respondent objected this time to the grant of the variation of permits to the Appellant. The Regional Transport Authority, after going through the procedure under section 57, granted on the 30th of April, 1957, the variation asked for by the Appellant in respect of his two buses, MDO Nos.1959 and 1960. As against this, the 1st Respondent has preferred a revision before the State Transport Appellate Tribunal which is said to be still pending. Not being satisfied with this, it is stated that the 1st Respondent filed another W.P. No.432 of 1957 before this Court and this Writ Petition appears to have been dismissed on the 8th November, 1957,for the reason that his alternative remedy, namely, a revision petition filed before the State Transport Appellate Tribunal was still pending. Consequent upon the dismissal of W.P.No.432 of 1957, the stay granted by this Court against the plying of the two buses by the Appellant was also vacated. In the result, the other two buses of the Appellant, MDO Nos.1959 and 1960 which are not covered by W.P. No. 467 of 1957 are stated to be now plying on the extended route, Tanjore to Koradachery *via* Kodavasal. We are not, in the present appeal, concerned with the permits granted to these two other buses of the Appellant.

On the 7th of January, 1957, about two months after the G.O. Ms. No. 3199, dated 16th November, 1956, was passed by the Government giving direction to the Regional Transport Authority under section 43-A (2), the 1st Respondent challenged the validity of this G.O. inW.P.No.18 of 1957 under Article 226 of the Constitution. The present Appellant was third Respondent in that petition. The 1st Respondent had prayed in the said Writ Petition, W.P.No. 18 of 1957, for a writ of *mandamus* and other appropriate reliefs and orders. This Writ Petition was dismissed by Rajagopalan, J., on the 2nd April, 1957, by an elaborate order in which every one of the prayers of the 1st Respondent was rejected as untenable and in respect of which no relief could be granted. On the question of the validity of the

G.O. however, the learned Judge declared accepting the contention of the learned counsel for the 1st Respondent, that the Government exceeded the jurisdiction conferred upon it by section 43-A (2) when it purported to limit the use of a portion of the extended route Tanjore to Koradachery in respect of " only two buses ". The propriety of this order of Rajagopalan, J., has been the subject of much argument on both sides, in the course of this appeal and I shall revert to the consideration of the same at a later stage. It may however be mentioned at this stage, that no appeal was preferred against this order of Rajagopalan, J., in the said W.P.No.18 of 1957 by the present Appellant, for the obvious reason that the petition was dismissed *in toto*, without giving any relief to the 1st Respondent, except for the finding that the G.O. was in excess of the jurisdiction vested in the Government under section 43-A (2) and on that ground declaring that the G.O. was not valid.

Sometime after this order in W.P.No.18 of 1957 was passed, that is, on the 13th May, 1957, the State Transport Appellate Tribunal, in its proceedings in R. No. 47986/A3/56, dated the 13th May, 1957 on a consideration of the revision petition of the Appellant represented on the 10th of October, 1956, the representation dated 27th of November 1956, made by Sri Rama Vilas (Private) Ltd. and the representation dated 4th of December, 1956 made by the 1st Respondent in this appeal, passed an order setting aside the order of the Regional Transport Authority dated 29th of July, 1956 and allowing the revision petition of the Appellant and directing the Regional Transport Authority to grant the variation applied for by the Appellant in respect of his two buses, MDO Nos.1081 and 1100. While passing this order, the State Transport Appellate Tribunal made a pointed reference to the petitions filed by the two M.L.As., namely, Sri Varadan and Thyagaraja Pillai, and the petition of the Appellant to the Government under section 43-A (2) which culminated in the issue of the G.O. Ms. No. 3199, dated 16th of November, 1956, directing the Regional Transport Authority to vary the existing route, Tanjore to Kumbakonam, into Tanjore to Koradachery in respect of two buses. After doing so, the State Transport Appellate Tribunal also referred to the writ petition filed by the 1st Respondent questioning the validity of the said G.O. and the terms thereof in the following terms :—

" The High Court dismissed the writ petition holding that the Government had powers to issue the said Government Order by virtue of section 43-A (2) of the Act and the High Court refused to grant the writ of *mandamus* applied for by Sri Raman and Raman Limited. "

After making these observations, the State Transport Appellate Tribunal considered exhaustively the merits of the case for and against the variation of the route and the issue of the permit in respect of the Appellant's two buses, in a lengthy paragraph and concluded in the following terms :—

" On a careful consideration of all the materials and contentions and the representations, I feel satisfied that the variation asked for by the petitioner is quite reasonable and is in the best interest of the travelling public particularly of the people residing on the sector Kodavasal and Koradachery and between Kumbakonam and Kodavasal. The Regional Transport Authority's order has therefore to be set aside. "

This order was communicated to all the parties that were before the Tribunal.

It was against this order that the 1st Respondent filed W.P.No. 467 of 1957 on the 27th of May, 1957, questioning the validity of the order issued by the State Transport Appellate Tribunal in its proceedings R.No. 47986/A3-56, dated 13th of May, 1957 on various grounds, which I shall presently, consider, and praying that the said order should be quashed and such further or other orders that may be necessary in the circumstances of the case may be passed. This writ petition along with other writ petitions Nos. 464 and 484 of 1957, 450 of 1957 and 486 and 1957 came up for disposal before the learned Officiating Chief Justice on the 8th November, 1957, and in a common order in which one of the main questions, namely, whether the State Transport Appellate Tribunal had jurisdiction to exercise any revisional powers after the 16th February, 1957, on which date section 64-A of the Motor Vehicles Act enacted and incorporated in the Act by Act C of 1956 was brought into force, was considered and the learned Offi-

ciating Chief Justice held that the attack on the validity of the exercise of the jurisdiction the State Transport Appellate Tribunal had to revise the orders of the Regional Transport Authority failed. After this finding, W.P. No. 467 of 1957 was again posted for the further hearing in view of the representations made by the learned counsel for the petitioner that there were several other features with reference to each of these petitions still to be considered, and on the 19th September, 1957, the learned Officiating Chief Justice passed an order holding that the order of the State Transport Appellate Tribunal dated 13th of May, 1957, was vitiated for the reason that it took into account G.O. Ms. No. 3199 as one of the relevant factors to be considered and thereupon set aside the said order. In passing the order, the learned Officiating Chief Justice also took into consideration a few other grounds for holding that the exercise of the revisional powers by the State Transport Appellate Tribunal was vitiated. It is this order of the learned Officiating Chief Justice and the various grounds on which it is based, which now forms the subject-matter of the appeal before us. I shall now proceed to consider the various points urged by the counsel on both sides as to the validity or otherwise of the order of the State Transport Appellate Tribunal now impugned in the writ petition.

The first point raised by Mr. G. R. Jagadisan, appearing on behalf of the Appellant, relates to the validity of the G.O. Ms. No. 3199, dated 16th November, 1956. That the Government is entitled to issue such orders and directions of a general nature as it may consider necesssary, in respect of any matter relating to road transport, to the Provinçial Transport Authority or a Regional Transport Authority, and that such Transport Authority shall give effect to all such orders and directions cannot be and is not disputed. Section 43-A (1) expressly vests such powers in the State Government. Similarly, that the State Government, may on a consideration of the matters set forth in sub-section (1) of section 47, direct any Regional Transport Authority or the State Transport Authority to open any new route or to extend an existing route or to permit additional stage carriages to be put, or to reduce the number of stage carriages on any specified route is also not disputed. Section 43-A (2) vests such powers in the State Government as per the amended section by enactment, namely, Madras Act XXXIX of 1954. If such power vests in the State Government to pass orders of the kind provided for by section 43-A (1) and (2), the question that arises is whether G.O. Ms. No. 3199, dated 16th November, 1956, was an order within the scope of the powers given by the section or it was outside the scope of the powers. Mr. Nambiar, appearing on behalf of the 1st Respondent, contended that the G.O. in question was outside the scope of the powers given to the State Government by section 43-A (1) and (2) had been decided in W.P. No. 18 of 1957 by Rajagopalan, J., and that the same question could not be canvassed before this Bench by the Appellant. It was also urged by Mr. Nambiar that so far as the present appeal was concerned, it related only to the validity or otherwise of the impugned order passed by the State Appellate Tribunal on the 13th of May, 1957 and any issue with regard to the validity of the Government Order Ms. No. 3199, dated 16th November, 1956 did not arise and could not be agitated by the first Appellant in this appeal. Mr. Jagadisan, the learned counsel for the Appellant, urged on the other hand, that in so far as the order passed by the State Transport Appellate Tribunal dated 13th May, 1957, was held to be vitiated and invalid by reason of the reference to the G.O. in question, which had been held to be invalid and unlawful by Rajagopalan, J., it was open to him to urge before this Bench that the G.O. itself was not invalid, that the decision of the learned Judge on the question of its validity or otherwise was not operative as *res judicata* against the Appellant and that therefore any reference to the G.O. if the G.O. were proved to be a valid one, would not vitiate the order passed by the State Transport Appellate Tribunal. Therefore, Mr. Jagadisan contended that he was entitled to canvass for the validity of the G.O. itself before a reference to it could be held to be relevant and valid or otherwise. I think there is force in this contention. The learned Judge who decided W.P. No. 18 of 1957, having held in the first instance that the G.O. was unlawful and in the next instance that reference to the said G.O. in the order passed by the State Transport Appellate Tribunal was a vitiating factor, the question as to the validity of the Government Order does arise though not directly for consideration in this appeal before this Bench. This Bench is, in my opinion,

not precluded from examining the question as to how far the order of the Government is unlawful and how far the reference made by the State Transport Appellate Tribunal to such an order had the effect of vitiating the order passed in revision by the State Transport Appellate Tribunal. In *Midnapur Zamindar Company* v. *Naresh Narayanan Roy*[1], their Lordships of the Privy Council held that the findings that may be adverse to a defendant who succeeded in the case cannot be *res judicata*, and that the succeeding party will not be precluded from raising the question as to the validity of the findings of the Court adverse to him in subsequent proceedings. The following passage occurring at page 55 is relevant to the point :—

" Their Lordships do not consider that this will found an actual plea of *res judicata*, for the defendants, having succeeced on the other plea, had no occasion to go further as to the finding against them ; but it is the finding of a Court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the Appellant to displace the finding, a duty which they have not been able to perform. "

A Bench of this Court presided over by the learned Chief Justice and Krishnaswami Ayyangar, J., in *Bapayya* v. *Ramakrishnayya*[2], had occasion to consider a case where a defendant was dissatisfied with certain statements made in the judgment which was filed in the appeal. In that case the decision in *Krishnachandra Goldar* v. *Moheshchandra Saha*[3], was relied on. The learned Chief Justice held that that case had no application to the facts before them. In doing so, the learned Chief Justice made the following observations :—

" In the first place, the trial Court accepted the plea of defendant 1 that the suit was not maintainable. He expressly asked for its dismissal and secured its dismissal with an order for costs in his favour. A party cannot be allowed to blow hot and cold, and defendant 1 having asked the Court to dismiss the plaintiff's suit, must accept the dismissal. Moreover, there is nothing in the decree which affects defendant 1 adversely. No finding in the judgment of the District Munsif can operate as *res judicata*. The rights of the parties were left entirely untouched by the dismissal of the suit. "

It is obvious that the appellant, in whose favour W.P. No. 18 of 1957 was dismissed, had no right of appeal and the findings against him in the said writ petition could not have been made the subject-matter of an appeal. Therefore as per the decision in *Natesa Pillai* v. *Central Road Traffic Board*[4], the findings of Rajagopalan, J., in the said writ petition could not operate as *res judicata* as against the Appellant, so as to prevent him from raising the question of the validity of these findings in the present appeal. I do not find any force in the argument of Mr. Nambiar that the validity of the G.O cannot be canvassed in this appeal as the learned Judge, Rajagopalan, J., had held it to be invalid or unlawful in the previous writ petition No. 18 of 1957. The contention however that in writ jurisdiction we have to go by the face of the order that has been impugned and that it cannot be supported on other grounds is a different matter and I shall revert to it at a later stage.

The question that has to be determined at the outset then is as to how far the particular G.O. in question, namely, G.O. Ms. 1399, dated 16th November, 1956, could be considered to be one passed in the exercise of the jurisdiction vested in the State Government under section 43-A (1). When once it is conceded that under section 43-A (2) of the Motor Vehicles Act, the State Government has power to direct any Regional Transport Authority or the State Transport Authority (1) to open any new route or (2) to extend an existing route or (3) to permit additional stage carriages to be put or (4) to reduce the number of stage carriages on any specified route, what remains to be examined is only whether the terms of the order of the Government in question are in any way in excess of the powers so given to the State Government and whether the said terms of the order infringe in any manner upon the exercise of the powers that are vested in the Regional Transport Authority or any other quasi-judicial Tribunal under sections 47 and 57 of the Motor Vehicles Act. A reading of the G.O. makes it clear that long prior to the petition submitted by the appellant to the Government for orders under section 43-A (2) the Government had received on 18th July, 1956, a representation from Sri Varadan, M.L.A. urging

1. (1921) I.L.R. 48 Cal. 460 : 48 I.A 49 (P.C.).
2. (1944) 2 M.L.J. 181 : A.I.R. 1945 39. Mad 39.
3. (1905) 9 C.W.N. 584.
4. (1951) 2 M.L.J. 406 : A.I.R. 1952 Mad.

upon the Government to consider the question of providing easy and quick transport facilities between Tanjore and Koradachery. The Government record produced before us discloses that this petition was in due course referred to the Deputy Transport Commissioner, the State Transport Authority, for remarks. Again another representation dated the 15th of July, 1956, was received by the Government from another M.L.A. Sri Thyagaraja Pillai, who is also the President of the District Congress Committee, Tanjore, urging that the Government should consider the same question of providing easy transport facilities for the convenience of the travelling public between Tanjore and Koradachery. This petition appears also to have been referred to the Deputy Transport Commissioner for his report in due course. It was only after these two representations had been referred to the Deputy Transport Commissioner that the Appellant submitted his petition for a similar relief being provided to the travelling public between Tanjore and Koradachery. No doubt in his representation the appellant memoralised to the Government not merely to consider the need for extending the existing service Tanjore-Kumbakonam to Koradachery *via* Kodavasal, but also prayed that the Regional Transport Authority may be directed for extending the existing service performed by his two buses, MDO Nos. 1081 and 1100 between Tanjore - Kumbakonam to Koradacheri *via* Kodavasal. In the report received by the Government from the Deputy Transport Commissioner, the State Transport Authority, dated the 19th of October, 1956, after setting out the various events and facts that had occurred prior to his report, the specific recommendation of the Deputy Transport Commissioner was in the following terms, as seen from the concluding paragraph of his report already extracted :

> "Thus from the above it will be seen that Sri Varadan, member of Legislative Assembly, and Sri M. D. Thyagaraja Pillai, Member of Legislative Assembly, and Sri Swami Motor Transport (Private) Ltd., Tanjore, have stressed the need for providing transport *facilities between Tanjore and Koradacheri via Kumbakonam and Kodavasal.* If the contention that there should be direct transport facilities between Tanjore to Koradacheri *via* Kumbakonam and Kodavasal is to be conceded, *then this can be achieved* only by opening a new route from Tanjore to Koradachery *via* Kumbakonam and Kodavasal." (Italics are mine.)

It has to be observed that the specific recommendation of the Deputy Transport Commissioner was only for opening of the new route from Tanjore to Koradacheri *via* Kumbakonam and Kodavasal and not with reference to any individual or specified buses. The preamble to the Government Order also makes it clear that what the Government was concerned with was only the suggestion that the existing route, Tanjore to Kumbakonam may be varied as Tanjore to Koradachery *via* Kumbakonam and Kodavasal and not the grant of the variation or permits to any particular operator or in respect of any particular buses of any operator. The Government has also stated in the first paragraph of the order in question that it has carefully examined the representation with reference to the conditions specified in section 47 of the Motor Vehicles Act and that it had consulted the Transport Commissioner in deciding that the present route Tanjore to Kumbakonam should be varied as Tanjore to Koradacheri *via* Kumbakonam in respect of two buses. In the operative portion of the Order, the Government has definitely stated that it was acting only in exercise of the powers conferred upon it by section 43-A (2) of the Motor Vehicles Act, 1939 (Central Act IV of 1939) and, it was only in exercise of such powers that it directed the Regional Transport Authority, Tanjore, to vary the existing route Tanjore to Kumbakonam as Tanjore to Koradachery *via* Kumbakonam and Kodavasal in respect of two buses.

The main objection to the terms of the G.O. before Rajagopalan, J., and before us centered round that part of the order which directed the Regional Transport Authority to vary the existing route *in respect of two buses.* (Italics are mine). While conceding that the G.O. is valid in so far as it directs the Regional Transport Authority to vary the existing route Tanjore to Kumbakonam as Tanjore to Koradachery *via* Kumbakonam-Kodavasal, Mr. Nambiar contends that the further direction that such variation should be "in respect of two buses" takes the order outside the scope of the powers vested in the Government under section 43-A (2), and therefore, it has the effect of encroaching or infringing upon the powers that are vested

only in the Regional Transport Authority to grant permits in consequence of such variation of the route. It is difficult for me to agree with Mr. Nambiar that the mere fact that the Government directed the variation to be in respect of two buses, at once converts the Government Order into a particular order, in favour of a particular individual, in respect of particular buses, and therefore takes it outside the character of a general direction, which latter alone is within the competence of the State Government under the said section 43-A (1) and (2). Mr. Nambiar seeks to support this argument by stating that this direction, that the variation should be considered in respect of two buses, if considered in relation to the application of the appellant for the variation of the existing service in respect of his two buses, namely, MDO Nos. 1081 and 1100, has undoubtedly the effect of encroaching upon the judicial discretion vested in the Regional Transport Authority to grant permits to any buses of any individual on his application. In my opinion, this contention of Mr. Nambiar cannot have any force, for if the State Government, while passing the G.O. was really concerned with the prayer of the Appellant that the variation should be granted in respect of his two buses, or if the Government had intended that the direction to the Regional Transport Authority should be to grant varition to the appellant in respect of the two buses named by the appellant, then certainly the Government should have issued the order in the manner now suggested by Mr. Nambiar. On the other hand, it is quite obvious that neither the preamble nor the operative portion of the G.O. do indicate that the specific request of the appellant was being granted ; nor that the grant of variation was to be for the buses whose numbers he had specified ; nor did it name any individual operator to whom the permits were to be granted, much less the name of the appellant. The fact, therefore, remains that though the Appellant had applied for variation of route in respect of his two named buses, the Government did not choose to grant his prayer, but declined to accede to the same and merely directed the Regional Transport Authority in general terms only to vary the permit in respect of two buses which were unspecified and unnamed. This would only go to show that the Government was not concerned with the actual grant of the permit to any particular individual or in respect of any particular bus, but was only confining itself to a general direction in terms of the order. This decision as to the issue of the permits and the selection of the particular operator and the particular buses was obviously left entirely to the discretion of the Regional Transport Authority and it cannot be said that there was any restriction or limitation imposed upon the powers or discretion of the Regional Transport Authority in the matter of choosing the operator and the buses for the variation of the route.

The further question that has been raised is whether the State Government was competent to limit the variation of the routes in respect of two buses only and whether it did not fetter the discretion of the Regional Transport Authority in the matter of actual number of buses to be put on the route. I do not think that the mere fact that the Government gave a direction that the variation of the route should be in respect of two buses, is a limitation that has the effect of interference with or infringement of the powers of the Regional Transport Authority. Under section 43-A (2), it has already been noticed that the State Government has power to direct any Regional Transport Authority or the State Transport Authority to *open any new route* or to *extend* any existing route or to permit *additional* stage carriages to be put or to *reduce* the number of stage carriages on any specified route. This power involves *ipso facto* the direction that the extension of the existing route may be in respect of one or more buses, so long as it does not specify the persons or the buses. Such a direction therefore that the extension of the route or variation thereof should be considered in respect of any two buses cannot be said to be inconsistent with or to be in excess of the powers vested in the Government. In having directed that the extension of the route should be in respect of two buses, the Government intended only to give an indication to the Regional Transport Authority that the need for extension of the existing route may be served by two buses. It did not also prevent, by any means, the Regional Transport Authority to grant more permits than two, if it felt that there was need to permit such extra number of buses. Conversely the Regional Transport Authority would have been well within its power also if it had thought it fit to restrict

the number of buses to less than two in consideration of the actual needs of the situation. Even if it were otherwise, I cannot agree with the contention of the learned counsel for the 1st Respondent that the direction to vary the permit in respect of two buses detracts the order of the Government from its general character and makes it one in excess of its jurisdiction ; or that it encroaches upon the powers of the Regional Transport Authority. On the other hand, it seems to me that it is but logical, consistent and appropriate that, while directing the Transport Authority to vary the existing route, the Government should indicate in respect of how many buses such a variation could take place, so long as the Government has not fettered in any way the discretion of the Regional Transport Authority to be exercised in a judicial manner, in the matter of choosing the deserving operator who is to be granted variation of the route and in fixing particular buses of any one or more of the operators, in respect of which such variation should be granted.

It has to be observed in this connection that the Government Order does not state that the variation of the route should be in respect of *only* two buses. The word, 'only' is not found in the terms of the order. The learned Judge, in deciding W.P. No. 18 of 1957, has however imported the word, 'only' on more than one occasion in the course of his judgment in order to support his view that the Government order limits the exercise of the jurisdiction that vests in the Regional Transport Authority by restricting the number of buses *only* to two. *Vide* pragraphs 14 and 16 in the judgment of Rajagopalan, J., in W.P. No. 18 of 1957. I do not think that there is any warrant for the importation of the term 'only' in the operative portion of the Government Order in question. It is only by the importation of such a term of limitation, that the learned Judge appears to have arrived at the conclusion that by reason of restricting the number of buses "only to *two* ", the Government exceeded its jurisdiction.

On the other hand, as observed by the learned Judge himself, in paragraph 9 of the said Judgment in W.P. No. 18 of 1957, the Government did not specify which two of the 17 buses, 11 belonging to the Appellant, 6 belonging to Sri Rama Vilas Service (Private) Ltd., and 10 belonging to the 1st Respondent, should be permitted to ply on the extended route and it did not purport to decide that question at all. No doubt, the Appellant, in his representation to the Government, specifically asked for a direction that two of his buses, MDO Nos. 1081 and 1100, should be permitted to ply up to Koradachery on the extended route, but as observed by the learned Judge himself, " that request was not granted by the Government, either in form or in substance in the G.O. in question." It was in this view that the learned Judge rejected the contention of the learned counsel for the 1st respondent that in substance the Government Order Ms.No.3199, dated 16th November, 1956, granted the 3rd respondent a variation of the condition of the permit for his two buses, MDO Nos. 1081 and 1100. That being so, the mere fact that the appellant applied for a direction in respect of his two buses, which direction was however not granted to him by the Government, cannot make the Government Order to have the effect of imposing a limitation on the powers of the Regional Transport Authority, simply because it stated that the extension of the route may be considered in respect of two buses, which clearly meant any two buses of any operator, existing or new.

Further, as I have already observed, there is considerable force in the contention of the learned counsel for the Appellant that the power of the Government to direct the Transport Authority to consider the extension of the route in respect of two buses was only ancillary or incidental to the powers vested in the Government under section 43-A (2) to direct the Regional Transport Authority to *permit additional* stage carriages to be put or to *reduce* the number of stage carriages on any specified route. Such a direction, as I have already, stated, does not in any way limit or take away the powers of the Regional Transport Authority to proceed under section 57 of the Motor Vehicles Act and to adjudicate the rights and claims as between the rival applicants, including the 1st respondent, for permits or variation of the routes in respect of buses either already plied by them or any new ones required to be put on the road. The terms " additional stage carriages " on " any new route " or " extension of an existing route " in section 43-A (2) do involve the suggestion as to the

number of buses that may be considered. It is also clear that the Government Order does not purport to take upon itself such adjudication of the rival claims between any operators or applicants by the terms of its order. After the issue of this general direction that the existing route should be varied in respect of two buses, the power of the Regional Transport Authority concerned, to proceed under the provisions of the Motor Vehicles Act is left wholly intact with regard to the further steps to be taken to give effect to the directions of the Government. It is not denied that the Transport Authorities constituted under the Act are bound to give effect to all the orders and directions given by the Government. I am, therefore, unable to hold that the Government Order should be construed to be one passed in excess of the jurisdiction vested in the Government under section 43-A (2), for the mere reason that the direction included an indication that the extension of the route or variation of the permit should be in respect of any two buses. From this point of view the Government Order is not vitiated and with all respect I am unable to agree with the decision of Rajagopalan, J., in regard to this Government Order.

A point has been taken by Mr. Nambiar that after the receipt of the Government Order in question, the Regional Transport Authority issued a notification calling upon the Appellant alone to state what objection he had for extension of the route in respect of his two buses and that the language in which this notification has been couched would go to confirm the view that the Government Order in substance granted the extension of the permits to the Appellant. How exactly the Regional Transport Authority acted after the receipt of the G.O. in question is not relevant for the consideration of the validity or otherwise of the Government Order. The procedure adopted by the Regional Transport Authority after the receipt of the said G.O. may be right or may be wrong, but it cannot have any bearing on the interpretation of the legality or otherwise of the Government Order itself or the scope of its terms.

The next point that has been urged by Mr. Nambiar against the validity of the Government Order is that it was passed without notice to the 1st respondent, in spite of its having been brought to the notice of the Government that the 1st respondent had applied for a permit in respect of a new route between Kodavasal and Koradachery and that he had also objected to the proposal to extend the route between Tanjore and Koradachery *via* Kumbakonam and Kodavasal, when it was notified under section 47 of the Motor Vehicles Act. Mr. Nambiar also contended that though the 1st respondent had not put in a representation before the Government, the principles of natural justice required that notice should have been given to the 1st respondent before the Government thought of passing the order in question. This point has been raised by Mr. Nambiar in W.P. No. 18 of 1957 and that has been dealt with by Rajagopalan, J., in the order dismissing the petition. In paragraph 19 of his order in W.P. No. 18 of 1957 Rajagopalan, J., has held that the failure of the Government to give an opportunity to the 1st respondent to make his representations vitiated the exercise of the jurisdiction the Government had to extend the route upto Koradachery. With due respect I am unable to agree with this view of the learned Judge. In considering the representations made to the Government by the two Members of the Legislative Assembly and by the appellant before us for a direction that the need for the extension of the route Tanjore to Kumbakonam as Tanjore to Koradachery *via* Kodavasal, the Government was not taking upon itself the duty of settling the question as to which of the operators should get the permit, in which case alone the first respondent, and any others, who happened to be the existing operators on the route, or near about it or on a sector thereof, would be entitled to notice. As I have already observed, the Government by its order definitely desisted from deciding or adjudicating the individual claims of the operators for the extension of the route in question. Apart from directing that Tanjore to Kumbakonam route may be varied as Tanjore to Koradachery, and that it could be done in respect of two buses, it did not, expressly or impliedly, direct the Regional Transport Authority as to the choice of the operator, or the selection of the particular buses to be granted permit on the extended route. The Government was, therefore, well within its province, when it took up for consideration the representations made to it and called for a report from

the Deputy Transport Commissioner, and thereupon passed a general order directing the Regional Transport Authority to extend the route in respect of two buses. In so far as the said order did not in letter or in substance involve the adjudication of the rival claims of any operator, or the suitability or otherwise of any particular operator, or bus, which had to be given permit, and the Government being well aware that that question was entirely within the jurisdiction of the Regional Transport Authority, there is no force in the contention that the Government should have given notice to the 1st respondent before it passed the order. Nothing compelled the Government to do so, much less any principles of natural justice.

The further contention raised by Mr. Nambiar that independently of any principles of natural justice, the Government were bound by the terms of section 43-A (2) read with section 47 (1) of the Act to give notice to the 1st respondent as one of the persons already providing road transport facilities along or near the proposed extension within the meaning of section 47 (1) has also been dealt with by Rajagopalan, J., in his order in W.P. No. 18 of 1957. He has observed in paragraph 20 of his order as follows :

> " It is true that section 47 (1) does require the statutory authority to take into consideration any representations made among others by persons already providing road transport facilities along or near the proposed route. That staturory obligation carries with it a further implied obligation to give notice to such bus operators was the contention of the learned counsel for the petitioner *which I am not inclined to accept.* It is not however necessary to express any concluded opinion of mine on that point in these proceedings. "

I am of the opinion that a reading of section 43-A (1) and (2) and the particular clause, which states that the Government may on a consideration of the matters set forth in sub-section (1) of section 47 direct the Transport Authority to do a certain thing, does not warrant that the operators concerned with the routes or a sector of the route or on the route nearby are entitled as a matter of right to any notice from the Government. Section 43-A (2) only states that the Government may on a consideration of the matters set forth in sub-section (1) of section 47 direct any Regional Transport Authority to do any one of the acts specified in that section. But it does not in letter or spirit require the Government itself to call for representations from the operators on any part of the route proposed to be extended. It had, on the other hand, instituted the proper proceedings by calling for a report from the State Transport Authority on the matters it had to take into consideration, and had in fact received an exhaustive report, on which it acted. If the representations are already made to Government, certainly the Government is entitled to take them into consideration. In this case, the 1st respondent had made no representation to the Government in the matter. Nothing contained in the terms of section 43-A (2) read with section 47 (1) of the Motor Vehicles Act compels the Government in my opinion to give notice to an orperator like the 1st respondent. While agreeing with all respect with the view expressed by Rajagopalan, J., in paragraph 20 of his order in W.P. No. 18 of 1957, though he has made some reservations, I think that the contention of Mr. Nambiar that the 1st respondent is entitled to notice either on principles of natural justice or in terms of section 43-A (2) is not tenable, and it has to be rejected. Consequently, the contention that the Government Order is vitiated for failure to give notice is not sound and cannot be accepted.

Another point which has to be considered is that it was not open to the appellant to have obtained an order like the one in question from the Government when he had the right to prefer a revision before the State Transport Appellate Tribunal and that the Government was not justified in issuing the Government Order when the appellant had another remedy. This argument proceeds on a fallacy. There is no provision in the Motor Vehicles Act which prevents the appellant from making a representation to the Government for taking action under section 43-A (2), however such representation may be misconceived in its scope. The mere fact that he had filed a petition and that it was rejected could not also prevent him from making such a representation to the Government. But in fact, he made his representation long prior to the rejection of his application. There is also nothing in the Act, which called upon the Government to refuse to consider any representation from

any party for directions under section 43-A (2) of the Act. All that the Government was concerned with was whether any direction was called for, in the interests of the public, and not with any adjudication of the rights and claims of rival parties when it was called upon to take action under section 43-A (2). The mere fact that a person in the position of the appellant was entitled to other remedies for redress of his grievance, was not a factor that could prevent the Government from taking action under section 43-A (2). Nothing could compel the Government to refuse to exercise the power vested under section 43-A (2) so long as it was not acting judicially and not usurping the powers of the Regional Transport Authority, in so acting. The argument, therefore that the Government acted illegally in issuing the Government Order in question on these grounds is wholly without any substance.

The next question that has been argued by Mr. Jagadisa Iyer is that even if it is considered that the direction in the impugned Government Order as to the extension of the route in respect of two buses was in excess of jurisdiction, still if this direction is ignored or deleted from the order of the Government, it will still be intelligible, complete and valid by itself. That is to say, if a part of the Government Order is bad in as much as it makes a reference to two buses, it cannot be said that the entire order on that ground is vitiated and illegal. Then the question for consideration is whether the so called offending portion constitutes such an intergral part of the Government Order, that if it were to be separated, the rest of the Government Order would become unintelligible and meaningless; or whether the offending part is so inextricably connected with the non-offending part that there could be no severance possible, in order to decide whether the Government Order could still be held valid after the severable portion is deleted or ignored. Mr. Nambiar argued that the entire Government Order had to be taken as an integrated whole and that severance was not possible; and this argument was accepted by Rajagopalan, J., in paragraph 16 of his Order in W.P. No. 18 of 1957. A reading of the impugned Order shows clearly that the first direction was in respect of the extension of the existing route Tanjore to Kumbakonam as Tanjore to Koradachery, and the second direction was that such an extension might be in respect of two buses. If the second direction is omitted from the Order, it seems to me pretty clear that the first direction could still stand without being affected in regard to its validity from the point of view of jurisdiction of the Government to issue such an order. With due respect to Rajagopalan, J., I am unable to agree with him that if the limitation on the number of buses to ply was beyond the jurisdiction of the Government, the entire order would appear to be vitiated. In *August Dorchy* v. *State of Kansas*[1], it is observed that a statute bad in part is not necessarily bad in its entirety and that legal effect can be given to the good part ignoring the bad and offensive part. The test to be applied is whether the bad part is so interwoven with the good part as not to be separable and if separated whether the remaining portion would not be viable and sustainable and meaningful. The intention of the Government in passing the Government Order is also a relevant factor to be taken into consideration in finding as to whether the order could be considered valid even if a portion of it is said to be invalid. In *State of Bombay* v. *Balsara*[2], on the question as to whether as a result of some of the sections of the Act having been declared to be invalid, what is left of the Act should survive or whether the whole Act should be declared to be invalid, Fazl Ali, J., has observed that the provisions which are invalid cannot affect the validity of the Act as a whole. He further observed that the test to be applied when an argument like the one addressed in that case was raised, had been very correctly summed up by the Privy Council in *Attorney-General for Alberta* v. *Attorney-General for Canada*[3], in these words:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is *ultra vires* at all."

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1. 264 U.S. 141 : 68 Law. Ed. 686.
2. (1951) 2 M.L.J. (S.C.) 141 at 161.
3. L.R. (1947) A.C. 505 (518)

In the light of these observations, I do not think that the latter part of the impugned Government Order is so inextricably connected with the earlier part as to entitle us to hold that the Government would not have passed that order at all without including the latter part. The first part of the order still remains essentially to be one directing the extension of the route in question, though in the 2nd part there is a further direction that such extension may be in respect of two buses. In *Shyamakant Lal* v. *Rambhajan Singh*[1], Sulaiman, J., has observed :

> " It is a well established principle that if the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseverably connected with it, then only such part is invalid, unless of course, the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be *ultra vires* in the former, while *intra vires* in the latter. The test is said to be whether " the statute with the invalid portions omitted would be substantially a different law as to the subject-matter dealt with by what remains from what it would be with the omitted portion forming part of it. " See *Rex* v. *Commonwealth Court of Conciliation and Arbitration*[2].
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> " A particular section of an Act however may not be an isolated and independent clause, and may form part of one connected indissoluble scheme for the attainment of a definite object ; in which case it would have to be considered as an inseparable part of the whole. A law which is *ultra vires* in part only may thereby become *ultra vires* in whole if the object of the Act cannot at all be attained by excluding the bad part. If the offending provisions are so interwoven into the scheme of the Act that they are not severable, then the whole Act is invalid ; see In re *Initiative and Referendem Act.*[3] For instance, the whole texture of the Act was found inextricably inter-woven in *Attorney-General for British Columbia* v. *Attorney-General for Canada*[4] ".

Applying these principles, the impugned order of the Government cannot be invalid in its entirety. The earlier part will still be valid even, if it is granted that the latter part is *ultra vires*.

The next question that arises is whether the Government Order is one that is adverse to the first respondent and whether it is vitiated for want of notice to the 1st respondent before it was passed. In so far as the Government Order gives only a direction that the route should be extended and that the extension should be considered in respect of two buses, it cannot be said to be an order adverse to the 1st respondent, as it does not affect his interest in any manner. The extension of the route, and the permits in respect of such extension, may be granted by the Regional Transport Authority either in favour of the first respondent or the appellant or the other operator, *viz*., Sri Rama Vilas Service, who is not before us. So far as the Regional Transport Authority was concerned, the question of granting permit was still open and lay within its province, and it could not be said that the mere issue of a direction that the route should be extended and that such extension should be in respect of two buses, was by any stretch of imagination adverse to any interest of the 1st respondent. If the issue of the direction was adverse to the first respondent's interests, it was no less adverse to the interests of the appellant, in so far as it did not concede his prayer that the permit should be in his favour and in respect of his two buses and no one could anticipate to whom the permits would actually be granted. On this ground also, it is not possible to agree with the contention that the Order of the Government in question was adverse to the interests of the first respondent, and therefore he was entitled to notice either under law or under the principles of natural justice before the Government passed the order.

Another point that needs to be considered in this connection is one raised by Mr. Jagadisa Iyer that the impugned order of the Government is only an administrative order and is not liable to be quashed on the application of the first respondent. I have already held that in so far as the impugned order was not adjudicating or deciding any rights between the parties, and so long as there was no ' list ' in relation to the direction which was issued by the Government, it could not be other than a mere administrative order. The proceedings taken by the Regional Transport Authority under section 47 and the decision in consequence of such proceedings have been held repeatedly to be purely administrative orders, even by Rajagopalan, J.,

1. (1938-39) F.L.J. (F.C.) 183 : (1939) 2 M.L.J. (Sup.) 45 : 1939 F.C.R. 193 at 213.
2. (1910) 2 Commonwealth L.R. 1 at 27.
3. L.R. (1919) A.C. 935 at 944.
4. L.R. (1937) A.C. 377 at 358.

himself, and even so if the order issued under section 43-A (2) does not encroach upon the powers of the Regional Transport Authority, it would remain only an administrative order. It has been the uniform ruling of this Court and other Courts in India that administrative orders like this are not liable to be questioned by means of writ proceedings. In paragraph 22 of his order in W.P. No. 18 of 1957 Rajagopalan J., has held that the contention that the impugned order viewing it merely as a direction under secton 43-A (2) to extend an existing route, must prevail. I respectfully agree with him. Rajagopalan, J., further held that the order was invalid on the sole ground that the direction contained therein that the extension should be considered in respect of two buses was in excess of jurisdiction. With due respect to him I am unable to agree with this view.

This leads on to the further question as to whether the order of Rajagopalan, J., was passed in the proper exercise of jurisdiction when he declared that the order of the Government was vitiated, while he dismissed the Writ Petition No. 18 of 1957 as a whole, and whether such a declaratory relief was available to the first respondent in writ proceedings. In *Chiranjit Lal* v. *Union of India*[1], the Supreme Court has observed in paragraph 45 of its judgment as follows :

> "As regards the other point, it would appear from the language of Article 32 of the Constitution that the sole object of the Article is the enforcement of fundamental rights guaranteed by the Constitution. A proceeding under this Article cannot really have any affinity to what is known as a declaratory suit. The first prayer made in the petition seeks relief in the shape of a declaration that the Act is invalid and is apparently inappropriate to an application under Article 32...."

It has also been observed that Article 32

> " is not directly concerned with the determination of constitutional validity of particular legislative enactments. What it aims at, is the enforcing of fundamental rights guaranteed by the Constitution, no matter whether the necessity for such enforcement arises out of an action of the executive or of the legislature. To make out a case under this Article, it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competence of the particular legislature as not being covered by any of the items in the legislative lists but that it affects or invades his fundamental rights guaranteed by the Constitution of which he could seek enforcement by an appropriate writ or order. The rights that could be enforced under Article 32 must ordinarily be the rights of the petitioner himself who complains of infraction of such rights and approaches the Court for relief."

Applying this ruling, it cannot be said that the impugned Government Order in any way affected any fundamental right of the first respondent to entitle him to any relief. The Order was under section 43-A (2) which was analogous to the procedure laid down in section 47 and quite different from the procedure laid down in section 57. To similar effect is the decision in *Maqbulnissa* v. *Union of India*[2], cited by Mr. Jagadisa Iyer. There it was held that the powers to issue writs orders or directions should not be utilised for giving what is in essence a declaratory relief. Considered in the light of these decisions, the net result of the order of Rajagopalan, J., in W.P. No. 18 of 1957 was no other than giving a declaration that the Government Order was invalid, when in fact it did not affect any rights of the first respondent or of any other party for the matter of that, and did not also enable the learned Judge to give the 1st respondent any one of the numerous reliefs he had asked for. This was because the Government Order was not judicial, as it did not decide any rights of one party or the other, and no matter was set at rest by the Government Order as between the first respondent, the appellant and any other operator. In that view, it was not an encroachment upon the judicial discretion vested in the Regional Transport Authority. The rights of the parties would get affected only by reason of a decision taken by the Regional Transport Authority in pursuance of section 57 of the Motor Vehicles Act.

If the Government Order was, therefore, valid and if no declaratory relief was available to the first respondent in respect of the Government Order and the entire Writ Petition No. 18 of 1957 was itself dismissed without giving any relief whatever

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1. (1951) S.C.J. 29 : (1950) S.C.R. 869 : A.I.R. 1951 S.C. 41.
2. A.I.R. 1953 All. 477 (F.B.).

to the first respondent, then the main question that arises is whether a reference to it by the State Transport Appellate Tribunal could on the face of the record, vitiate the order passed by the State Transport Appellate Tribunal in revision against the order of the Regional Transport Authority under section 57 of the Motor Vehicles Act. Before this question is decided, I should deal with a few other points raised in this connection by Mr. Jagadisa Iyer, the learned counsel for the appellant.

In the first place, Mr. Jagadisa Iyer contended that the first respondent was not a person aggrieved and could not maintain the writ petition out of which the present appeal has arisen, as he had no *locus standi* to do so. It is argued that in the present case, there is no civil right that has been violated, so as to enable the first respondent being considered as an aggrieved party to justify a writ application. The right that the first respondent is agitating for is no doubt a statutory one created by the provisions of the Motor Vehicles Act. If he wants to enforce such a statutory right when it is violated, the statute itself lays down the procedure which he has to conform to before he seeks the enforcement of the right under Article 226 of the Constitution. It has been repeatedly laid down that the Motor Vehicles Act furnishes a complete machinery in itself for the vindication of the rights assured by its provisions and that the remedy must be sought within the scheme of the Act itself. It is also incumbent on the Court to see how far the parties seeking relief under the said Article 226 of the Constitution have conformed to the requirements of the statute before any relief could be given to them. As has already been pointed out, the first respondent did not lodge before the Regional Transport Authority any representation in response to the notification issued under section 57 (3) of the Motor Vehicles Act. He did not also participate in the public hearing on the 26th of July, 1956, when the decision was made, rejecting the application of the appellant. The first respondent, no doubt, intervened in the proceedings before the State Transport Appellate Tribunal, when the appellant invoked jurisdiction of that Tribunal under section 64 (2) of the Act. But having failed to make any representation before the Regional Transport Authority, and having failed also to conform to the requirements of section 57 (4), the first respondent had no *locus standi* to go before the State Transport Appellate Tribunal, being a defaulter in the matter of conforming to the procedure prescribed under section 57 of the Act. The mere fact that he filed a representation before the State Transport Appellate Tribunal, which was admittedly out of time, could not also give him a *locus standi* as contended for by Mr. Nambiar. So also the fact that the State Transport Appellate Tribunal took into consideration the belated representation of the first respondent, who had not availed himself of the right given to him under the statute, would not make him, or give him the status of, a party to the proceedings before the State Transport Appellate Tribunal. To say that because the State Transport Appellate Tribunal took into consideration the belated representation of the first respondent, the first respondent became factually a party to the revision proceedings before the State Transport Appellate Tribunal and thereby acquired a *locus standi* so as to invoke the jurisdiction of this Court under Article 226 of the Constitution is a contention which appears to me to be far-fetched. It may be that this Court does not exercise an appellate or revisional jurisdiction under Article 226 of the Constitution. But it does not mean that it should overlook the fact as to how far the party, invoking such a jurisdiction, has itself conformed to the provisions of the statute under which he seeks enforcement of his rights. It does appear that in passing the order setting aside the decision of the Regional Transport Authority the representation of the first respondent was taken on file by the State Transport Appellate Tribunal but that by itself would not give a *locus standi* to the first respondent and make him an aggrieved party, unless it be that a legal right of the respondent had been violated, which alone would enable him to seek relief under Article 226 of the Constitution. In *The State of Orissa* v. *Madan Gopal Rungta*[1], in discussing the scope of the power of this Court in issuing writs or directions, it has been observed at page 33 as follows :

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1. A.I.R. 1952 S.C. 28.

"The language of the Article shows that the issuing of writs or directions by the Court is not founded only on its decision that a right of the aggrieved party under Part III of the Constitution (Fundamental rights) has been infringed. It can also issue writs or give similar directions for any other purpose. The concluding words of Article 226 have to be read in the context of what precedes the same. Therefore, the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article."

No doubt in *C.S.S. Motor Service* v. *State of Madras*[1], it has held that the plying of a motor vehicle is a fundamental right, but what is the fundamental right that the first respondent has acquired in the present case and which has been violated by the decision of the State Transport Appellate Tribunal? Obviously none: In In re *Ramamoorthi*[2], also it has been held that it is not the province of the High Court to interfere either *suo motu* or at the instance of any person, whenever there is any disregard or violation of any of the provisions of the Constitution. Its power under Article 226 of the Constitution can only be invoked at the instance of a person who has a personal grievance against any act of the State in its executive capacity, which inflicts a legal injury on him since, the right, which is the foundation of a petition under Article 226 of the Constitution or a corresponding provision, is a personal and individual right. Therefore, the mere passing of an order which is presumed to be adverse to the first respondent without his having conformed to the requirements of section 57 of the Motor Vehicles Act will not involve the violation of any legal rights accrued to or vested in the first respondent nor could it be said to have caused any legal injury to him. The mere statement of the first respondent in his affidavit that he is likely to suffer irreparable loss and will be gravely prejudiced, cannot be held to be sufficient in the eye of the law to establish that there was legal right violated or legal injury caused to him by the order of the State Transport Appellate Tribunal so as to give him a *locus standi* to file the writ out of which this appeal has arisen.

The decision in *Anwar Khan* v. *Munim Khan*[3], which followed the decision in *Bagaram* v. *State of Bihar*[4], that the invocation of writ would be available only for the enforcement of a legal right and the performance of legal duty is quite pertinent to the present case. In *Ragunath* v. *S.T.A., Orissa*[5], a Bench of the Orissa High Court held that:

"Where a person files an objection to the grant of a permit to another person long after the period fixed by section 54 (4) is over, he has no right of appeal. Consequently, the Chairman of the Provincial Authority has no jurisdiction to hear the appeal filed by such a person and to set aside the order of the Regional Transport Authority."

In *V.M.T. Asson* v. *M.T. Service*[6], also a Bench of the Nagpur High Court held that where the petitioner has not made his representation under section 57 (3), Motor Vehicles Act, 1939, for an additional permit, he is not entitled to be heard in opposition to the application of the non-applicant to whom the permit is granted. In the present case, if the first respondent had not put in his opposition before the Regional Transport Authority, his representation before the State Transport Appellate Tribunal, itself being beyond time, the fact whether or not his representation was taken into consideration by the State Transport Appellate Tribunal, could not give the first respondent any right to question the order of the State Transport Appellate Tribunal in a writ proceeding.

In the light of the rulings cited above, the question arises as to whether if the first respondent had no right of appeal by reason of having failed to put in his objection under section 57 (3) and (4), could he be placed in a better position when he comes before the Court invoking the writ jurisdiction, without having complied with the provisions of the statute. In *Ex parte Stott*,[7]

"a licensing authority under the Cinematograph Act, 1909, granted to a theatre proprietor a licence for the exhibition of cinematograph films at his theatre. The licence was subject to the condition that the licensee should not exhibit any film if he had notice that the licensing authority

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1. I.L.R. (1953) Mad. 304.
2. (1952) 2 M.L.J. 671 : A.I.R. 1953 Mad. 94.
3. A.I.R. 1953 Hyd. 228.
4. A.I.R. 1950 Pat. 387.
5. A.I.R. 1951 Orissa 81.
6. A.I.R. 1953 Nag. 150.
7. L.R. (1916) K.B. 7.

objected to it. A firm who had acquired the sole right of exhibition of a certain film in the district in which the theatre was situated entered into an agreement with the licensee for the exhibition of the film at his theatre. The licensing authority having given notice to the licensee that they objected to the exhibition of the film the firm applied for a writ of *certiorari* to bring up the notice to be quashed on the ground that the condition attached to the licence was unreasonable and void, and that they were aggrieved by the notice as being destructive of their property." It was held that "whether the condition was unreasonable or not, the applicants were not persons who were aggrieved by the notice and were not entitled to apply for a *certiorari* ".

Applying the ruling of this case, the mere existence of an adverse order, even if the order of the State Transport Appellate Tribunal were considered to be one such, would not justify the application for a writ. The party applying must be the person aggrieved by the order. A mere remote injury cannot be of any avail, nor a mere complaint would be enough.

There is also another aspect to be considered in coming to the conclusion as to whether the first respondent had any *locus standi* to file a writ application and it turns upon the conduct of the first respondent himself. The first respondent, not having taken advantage of the procedure available to him in the various stages prior to the passing of the revisional order, could he be still entitled to say that he has a right to come to this Court by a writ of *certiorari* . Paragraph 265 at page 140 of Halsbury's Laws of England, Third Edition, Volume II, has been relied on by the learned counsel for the appellant in this connection. It states thus :

" Although the order is not of course it will though discretionary nevertheless be granted *ex debito justitiae*, to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief ; and this is the case even though *certiorari* is taken away by statute, and although there is an alternative remedy. The order of *certiorari* will never be granted to remove an erroneous order at the instance of the party in whose favour the error was made ?"

Mr. Jagadisa Iyer also relied upon paragraph 119 of the same Volume the observations in which are to the same effect.

The continuous default of the first respondent in the instant case to observe the procedure under section 57 (3) and (4) is certainly a relevant factor which would disentitle the first respondent to invoke the writ jurisdiction of this Court.

Relying upon *Dholpur Co-operative T. and M. Union* v. *Appellate Authority*[1], Mr. Nambiar argued that as a result of the introduction of two more buses by an illegal order on the route, the income of the first respondent was likely to decrease, that the loss was quite substantial and could not be said to be normal, and that, therefore, it could not be denied that the first respondent was substantially affected by the order of the State Transport Appellate Tribunal, that the first respondent was therefore an aggrieved person and that he had a right to challenge the order of the State Transport Appellate Tribunal on the ground of total lack of jurisdiction by an application under Article 226 of the Constitution of India. I do not think that Mr. Nambiar has laid proper and sufficient foundations for the application of this decision to the facts of the present case. In so far as the route was being only extended and the first respondent was not on the extended route previously, it cannot be said that he was suffering any substantial loss by reason of two buses having been introduced on the extended route between Kodavasal and Koradachery. That nobody was operating on this route prior to the sanctioning of the extension and granting of permits is beyond dispute.

Another point urged by Mr. Nambiar was that even though the first respondent did not make the appellant a party in his representation, dated 4th December, 1956, before the State Transport Appellate Tribunal, a copy of the order of the State Transport Appellate Tribunal was however, communicated to him and this gave him right to file the writ application. It is rather extroardinary to contend that because a copy of the order was communicated to the first respondent he became an aggrieved party so as to question the order in a writ petition. It is significant also that the

1. A.I.R. 1953 Raj. 193.

appellant did not make and had no reason to make the first respondent a party before the State Transport Appellate Tribunal. Could it be contended in the circumstances that the first respondent became an aggrieved party, because he had made a representation which was out of time to the State Transport Appellate Tribunal.

In *Anjaneya Motor Transport* v. *State of Madras*[1], the learned Chief Justice and Rajagopalan Iyengar, J., have considered the question as to how far a person who does not conform to the procedure laid down by the Statute is entitled to notice or would have *locus standi* to prefer an appeal. The headnote of that decision is in the following terms :

" Section 57 (3) of the Motor Vehicles Act makes provisions for the interested public being notified when an application for the grant or variation of a permit is made to the Transport Authority. Section 57 (4) provides the limitation. If an operator or a person intersted does not take steps in time, he has no right to be heard before orders are passed and that is the effect of section 57 (4). When an appeal or revision is filed, though there is no statutory provision, in that regard the principles of natural justice require that notice should be given to those who were parties to the proceedings. But merely because a person files a representation out of time, he does not become in any sense a party to the proceedings entitled to notice of and hearing of the revision or appeal. The knowledge of the appellate or revisional authority as to the existence of a person whose rights may be affected has really no bearing upon the right of such person to notice. If the authority (the Government) had the power to pass an order (under its revisional jurisdiction) such an order could not be held to be vitiated by the caption given to it purporting to be an appeal."

In his further observations Rajagopala Iyengar, J., has stated as follows :

" From this it is argued that the appellants should be treated as parties to whom notice ought to have been issued and that any order passed without notice to them would be vitiated as contravening the principle of *audi alteram partem*. The learned Judge in the judgment under appeal has explained this decision to which he was himself a party and we agree with him in his construction of this passage as not supporting the contention of the appellants."

I respectfully agree with the ruling in this Bench decision and it is sufficient authority for the proposition that the first respondent in this case cannot have any *locus standi* to file a writ application or to complain that the order of the Government was passed without notice to him. For all the above reasons, I am inclined to hold that the first respondent had no *locus standi* to invoke the jurisdiction of this Court in writ proceedings against the order of the revisional authority, namely, the State Transport Appellate Tribunal.

The next question that still remains to be considered is whether a reference to the Government Order in the order passed by the State Transport Appellate Tribunal, which was impugned in the writ petition out of which this appeal, has arisen, vitiated the order passed by the State Transport Appellate Tribunal. I have already dealt with the question that if the Government Order is a valid Government Order a reference to it will not vitiate the order. I shall now proceed on the basis that if the Government Order was illegal and invaild, as was declared by Rajagopalan, J., a reference to it has really vitiated the order of the State Transport Appellate Tribunal. On this question, Mr. Jagadisa Iyer argued that the order of the State Transport Appellate Tribunal is not based on the validity of the Government Order but rather on the merits of the case. There is force in this contention. A close perusal of the order would show that in the earlier part thereof, the history of the case has been set out and thereafter the appellant's case has been set out. In the next stage, the applications made by the two members of the Legislative Assembly have been referred to. Then the representation of the appellant himself, dated the 6th of August, 1956, to the Government has been referred to. Then the Government Order, dated the 16th of November, 1956, is referred to in the following terms :

" The Government in their order in G.O. Ms. No. 3199, Home, dated 16th November, 1956, decided that the present route Tanjore to Kumbakonam should be varied as Tanjore to Koradachery (*via*) Kumbakonam and Kodavasal in respect of two buses on that route and issued directions to the Regional Transport Authority, Tanjore, to vary the existing route accordingly."

This reference to the Government Order, it should be remembered does not say that the Government Order in terms or by implication was to the effect that the

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1. (1955) 2 M.L.J. 336.

appellant should be given permit on the extended route. It only refers to the decision of the Government and directions to vary the route accordingly. So that it cannot be said that the State Transport Appellate Tribunal understood the order of Government to be anything more than a general direction contemplated under section 43-A (2) of the Motor Vehicles Act. The State Transport Appellate Tribunal, could not, therefore, be taken to have understood this order as a judicial order infringing upon the authority and discretion of the Regional Transport Authority to grant the permits to any fit and proper persons. After having set out the order in the only manner in which it could have been done, the State Transport Appellate Tribunal then proceeds to refer to what took place after the Government Order was passed. It stated that immediately after the Government Order was issued by the Government, Messrs. Raman and Raman filed Writ Petition No. 18 of 1957 questioning the validity of the Government Order and prayed for the issue of a writ of *mandamus* directing the Regional Transport Authority, Tanjore, and the petitioner herein to forbear from enforcing the directions in the said Government Order. Here, again, it cannot be said that the State Transport Appellate Tribunal was setting forth anything beyond the narration of what actually had taken place at an earlier stage. The reference that is now objected to as having had the effect of vitiating the order of the State Transport Appellate Tribunal is in the following terms :

> " . . . . . the High Court dismissed the writ petition holding that the Government had powers to issue the said Government Order by virtue of section 43-A (2) of the Act and the High Court refused to grant the writ of *mandamus* applied for by Sri Raman and Raman, Ltd."

This statement of the State Transport Appellate Tribunal is generally correct, and it does not appear, by any construction that may be put on this statement, that the State Transport Appellate Tribunal misconstrued the scope of the order of the High Court in W.P. No. 18 of 1957. For in the first instance, the statement says that the High Court dismissed the petition. This is a statement of fact and cannot be disputed. Then it says that the High Court held that the Government had powers to issue the said Government Order by virtue of section 43-A (2) of the Act. Except for the words " the said Government Order " this statement also is quite consistent and in keeping with what the State Transport Appellate Tribunal had stated in the earlier portion of its order when it made a reference to the Government Order itself. For, as has already been pointed out, the State Transport Appellate Tribunal, in the earlier portion of the order itself definitely understood the Government Order only to be of a general character and of an administrative kind and not as one deciding any dispute between the contesting or rival operators. In that light, the statement made by the State Transport Appellate Tribunal, that the High Court held that that the Government had powers to issue the said Government Order by virtue of section 43-A (2) of the Act could not be said to be a wrong understanding or misconstruction of the High Court's decision. In fact, in paragraph 22 of his order, while dimissing W.P. No. 18 of 1957, Rajagopalan, J., has held that viewing it (the Government Order) merely as a direction under section 43-A (2) to extend an existing route it was an administrative order, and that that contention should prevail. The understanding by the State Appellate Tribunal also appears to me to be quite in accordance with this finding of the learned Judge in the said paragraph 22 of his order. For, what the State Transport Appellate Tribunal has said is that the High Court held that the Government had powers to issue the Government Order by virtue of section 43-A (2), and if that is read along with the prior statement that the Government in this Government Order issued directions to vary the existing route in respect of two buses, there appears to be no scope for the contention that the State Transport Appellate Tribunal misunderstood or misconstrued the High Court's decision. The State Transport Appellate Tribunal only understood the order of the Government to be an order issued under section 43-A (2), giving a general direction to the Regional Transport Authority, and that such a general direction given under section 43-A (2) was legitimate and legal is what the High Court itself had held in W.P. No. 18 of 1957. In other words, what the State Transport Appellate Tribunal understood from the order of the High

Court in W.P. No. 18 of 1957 was nothing more than that the Government was within its powers in giving a general direction to the Regional Transport Authority.

In the next stage, the State Transport Appellate Tribunal went on to say that the High Court refused to grant the writ of *mandamus* applied for by Messrs. Raman and Raman, thus showing that its understanding of the High Court order as one upholding the Government Order only as a general order falling within the scope of section 43-A (2), in respect of which no relief could be given to the first respondent; unless it is clearly established that the State Transport Appellate Tribunal understood the order of the Government as a direction given to the Regional Transport Authority to give extension of the route, and permits to the appellant, which is by no means the case, and that it understood further that such a specific order was upheld by the High Court, it cannot be argued that the State Transport Appellate Tribunal was influenced by the Government Order or that it misconstrued the decision of the High Court, when it decided to set aside the order of the Regional Transport Authority and directed the variation of the route in favour of the appellant's two buses.

Even granting that the State Transport Appellate Tribunal misconstrued the High Court's order, that its decision was influenced by such a misconstruction is not apparent by any means on the face of the record. For, in the next half of its order it deals elaborately with the merits of the case for coming to the conclusion that the order of the Regional Transport Authority under Revision should be set aside, instead of proceeding to set aside the order of the R.T.A. on the basis of the Government Order and the High Court's order in W.P. No. 18 of 1957. In this part of the order every aspect of the case has been discussed in order to justify its decision. If it was influenced by the Government Order or the wrong understanding of the High Court's order in W.P. No. 18 of 1957, there was absolutely no need for the State Transport Appellate Tribunal to go into the merits at all, and the mere fact that it did so, only goes to prove that what influenced the State Transport Appellate Tribunal was only the merits of the case and the need for the variation is the interest of the public and not the two other factors, *viz.*, the Government Order and the High Court's order. The mere statement that on a careful consideration of all the materials and contentions and the representations the State Transport Appellate Tribunal felt satisfied that the variation asked for by the petitioner was quite reasonable and was in the best interests of the travelling public, particularly of the people residing on the sector Kodavasal and Koradachery and between Kumbakonam and Kodavasal, cannot be said to be a vitiating factor, so as to make the order of the Tribunal illegal and capable of being quashed. The reference to the Government Order as a general direction contemplated under section 43-A (2) no doubt was there, but it cannot be said that such a reference was to an irrelevant factor as Rajagopalan, J., has held. If the State Transport Appellate Tribunal conceived of the Government Order to be a general order and of its statutory force as such an order, then a reference to it must be held to be a reference to quite a relevant factor. It cannot be said to vitiate the order of the State Transport Appellate Tribunal. But the fact however remains, as could be gathered from the elaborate discussion of the merits of the case, that the State Transport Appellate Tribunal did not consider the Government Order as of a binding character or fettering its discretion in which case it should have stopped with a reference to the Government Order and proceeded to give its decision immediately on the basis of the Government Order itself.

I is significant to note in this connection that no exception has been taken to the merits of the order of the State Transport Appellate Tribunal, setting aside the order of the Regional Transport Authority. A mere reading of the order would show, on the face of it, that the Tribunal allowed itself to be influenced by the Government Order is what Mr. Nambiar contended. It is difficult for me to accept this contention. In my view, the Government Order has been understood to be merely a general order with regard to the extenion of the route with an indication as to the number of buses that may be permitted. A reference to it in this light cannot be said to be illegal. The order of the Government has been construed by the State

Transport Appellate Tribunal, as seems to be the case; that it was only a general direction given by the Government. If such be the case, then a reference to it cannot be said to be an extraneous consideration which has influenced the order in question. A subordinate Tribunal like the Regional Transport Authority or the State Transport Appellate Tribunal, it is conceded, is bound to consider the order of the superior authority issued in regard to policy of the Government or in the interests of the public as a whole. In other words, if the State Transport Appellate Tribunal understood the order of the Government to be one of a general character competent to be issued under section 43-A (2) of the Act, and if a reference is made to that order in that view, in coming to a conclusion on the merits of the case, surely it cannot be said that the Tribunal was surrendering its discretion when it decided on the merits of the question before it. At page 335 of Cases in Constitutional law by Keir and Lawson, 4th edition, the following observations occur which seem to be apposite to the present case :

> " Can a person entrusted with a discretion be held to surrender his discretion if he conforms to a policy or rules laid down by a superior authority or even the Government itself ? Obviously if the superior authority or the Government embodies its policy or rules in legislation which it has power to make, the subordinate must obey. He does not surrender his discretion because the limits of his discretion have been changed. Otherwise it seems that although he surrenders his discretion and acts ineffectually if he actually obeys the order of a superior (*Simms Motor Units, Ltd.* v. *Minister of Labour*[1], he acts lawfully and effectually if he conforms freely to the policy of the Government. As Evatt, J. said in *R.* v. *Mahony Ex parte Johnson,*[2])
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> " In order to show that the respondent's discretion was influenced by irrelevant matters, much has been made of the fact that the respondent has stated, in his very candid affidavit, that he paid regard to the Commonwealth Executive Policy, although receiving no dictation from Government."
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> " If it is assumed that the licensing officer has discretion to refuse licences, I think that he is not debarred from considering the existence of such a policy. He would be regarded not as a judicial but as an administrative officer vested with a discretionary power. He would have to act honestly, but he might well pay some regard to the preference scheme favoured by the Government. He would be expected to pay special attention to the requirements of the port which, in a sense, is committed to his charge. Above all, the discretion to be exercised would be his discretion, and he could not allow the Executive or any other person to exercise it for him. Upon the same assumption of a discretion, there is no reason why he should not be allowed to seek the opinions of persons well experienced in the methods of providing and organising labour. It cannot be assumed that the well experinced and the well qualified are absent from the responsible executive of the day."

It is obvious from a reading of the order of the State Transport Appellate Tribunal that, far from being carried away by the Government order or by the misconstruction of the High Court's order in W.P. No. 18 of 1957, the State Transport Appellate Tribunal actually went into the merits of the case, notwithstanding these two factors, and was influenced only by what it thought was in the best interests of the public and therefore in its revisional jurisdiction directed the Regional Transport Authority to vary the route and to issue permits to the appellant.

The further question that arises for consideration is whether by looking at the order and on the face of the record it appears that the State Transport Appellate Tribunal has relied upon something which the High Court has not stated in W.P. No. 18 of 1957 and whether that forms the basis of its decision. As already observed, in my view, its decision is not based upon its misconstruction that the High Court held the Government Order to be valid and lawful. What the State Transport Appellate Tribual understood was that the High Court held that the Government *had powers to issue* the Government Order under section 43-A (2) and not that the High Court had held that the Government Order was a *valid one,* and that the High Court dismissed the writ without granting any relief. To my mind it makes considerable difference between saying that the High Court held that the Government *had power to issue* the Government Order under section 43-A (2) and saying that the High Court held the Government Order in question to be *valid* and *lawful*. That this latter is not what the State Transport Appellate Tribunal stated goes to throw much light upon how the State Transport Appellate Tribunal construed the decision of the High Court in W.P. No. 18 of 1957. The State Transport Appellate Tribunal may also be taken to have construed the order of the High Court to say that the Government Order was valid only so far as it applied to the extension

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1. (1946) 2 All E.R. 201. 2. (1936) 46 C.L.R. 145.

of the route and not to the extension in respect of two buses if it is remembered that it had the Government Order before it, which it must have perused in full. Such a view does not appear to be causing any violence to the meaning of the words used by the State Transport Appellate Tribunal in the context. However the fact remains that the decision of the State Transport Appellate Tribunal is based only on the merits irrespective of the legality or otherwise of the Government Order and there can be little doubt that it would have arrived at the same conclusion even if it had construed the decision of the High Court in W.P. No. 18 of 1957 as declaring the Government Order to be invalid and unlawful in its entirety.

On the point that the State Transport Appellate Tribunal had misdirected himself by referring to the Government Order as a relevant factor, I have already observed that so far as the State Transport Appellate Tribunal was concerned, the G.O. was a relevant factor, when it is remembered that the Government had power to issue a general direction under section 43-A (2) and when it is considered that the State Transport Appellate Tribunal took the Government Order only as a direction to vary the extended route in respect of two buses and not as specific order deciding any rights between any set of parties.

Another point argued by Mr. Nambiar is that when the State Transport Appellate Tribunal made a reference to the Government Order and took it into consideration, the first respondent ought to have been given notice that the State Transport Appellate Tribunal intended to take into consideration the said Government Order. I do not think that there is any force in this contention. It cannot be argued that the first respondent was entitled to any notice and that he ought to have been given notice of the Government Order. This Government Order was passed on the 16th of November, 1956. It was the subject-matter of W.P.No. 18 of 1957 filed by that first respondent himself, and the order in that writ petition was passed on the 2nd of April, 1957. The impugned order of the State Transport Appellate Tribunal was passed on the 13th of May, 1957. When the first respondent challenged the said order of the Government in W.P.No.18 of 1957 filed on the 7th of January, 1957, he had full information and knowledge that copies of that G.O. were communicated to all the Transport Authorities and the parties thereto and that the Transport Authorities were bound to give effect to such orders in so far as they were valid. Nothing could have prevented the first respondent in bringing, to the notice of the State Transport Appellate Tribunal, his objection that the G.O. should not be taken into consideration, while considering the revision. The first respondent knew also that a copy of the judgment in W.P.No.18 of 1957 had been sent to the Regional Transport Authority. He had effective and real opportunity thus to present his case against the G.O. before the State Transport Appellate Tribunal. In these circumstances, it is futile for the respondent's learned counsel to contend that the State Transport Appellate Tribunal should have given notice to the first respondent that it would take into consideration the G.O. on the ground that it was a fresh matter not within the knowledge of the first respondent.

Reliance has been placed in this connection on the judgment of the learned Chief Justice in W. A. No. 35 of 1955. The facts in that case are not *ad idem* with the facts in the present case. It cannot be said that in the present case the G.O. or the order in W. P. No. 18 of 1957 was evidence in any sense of the term to enable the Tribunal to come to a decision. The principle of the decision in *Jerbai K. Kapadia*, In re[1], does not have any application to the facts of the present case. The Government Order, as stated already, has been contested and challenged by the first respondent and he was fully aware of its import and effect and he should have known that such Government Orders are always circulated to the Tribunals subordinate to the Government. It has been rightly argued by the learned counsel for the appellant that judgment and G.Os. cannot constitute new matters of evidence in any sense of the term. Even though the G.O. was not published, when once the first respondent knew about the contents of the G.O. and the fact that such G.Os. are commnicated to the subordinate Tribunals to be

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1. A.I.R. 1945 Bom. 1.

obeyed, it was open to the first respondent to have made any representation he liked to the State Transport Appellate Tribunal in regard to the G.O. It is difficult to see how the Tribunal was bound to give notice of the G.O. to the respondent, unless there was some controversy or dispute about it or its contents, which alone would compel the Tribunal to give notice to both the parties for arguments or clarification. The contention that the Tribunal was in duty bound to give notice to the first respondent about the G.O. which was communicated to it, and failure to do so, has occasioned failure of justice, is devoid of any force, especially when the first respondent had every effective opportunity, to place his objections before the State Transport Appellate Tribunal. The G.O. cannot be described as a new matter of evidence to be taken into account by the State Transport Appellate Tribunal so as to justify an opportunity being claimed by the first respondent as if to rebut the contents of the G.O. This is especially so, when it is remembered that the first respondent was not himself keen in prosecuting the case before the State Transport Appellate Tribunal, as could be seen by his belated representation. Actually he was acting indifferently in the matter, because he knew that he had no *locus standi*, and therefore not entitled to notice. Still there was ample justice shown to him, when his representation which was filed certainly long after the G.O. was issued, was taken into consideration by the State Transport Appellate Tribunal. In *New Prakash Transport Co., Ltd.* v. *New Suwarna Transport Co., Ltd*[1]., reiterating the observations and approving the decision in *Veerappa Pillai* v. *Raman and Raman Ltd.*[2], it has been held as follows :

"Keeping in view the observations of this Court quoted above and the principles of natural justice discussed in the several authorities of the highest Courts in England, we have to see how far the provisions of the Motor Vehicles Act and the rules framed thereunder justify the criticism of the High Court that the Appellate Authority did not give full and effective opportunity to the first respondent to present his point of view before it. As already indicated, the statutory provisions do not contemplate that either the Regional Transport Authority or the Appellate Authority had to record evidence or to proceed as if they were functioning as a Court of law. They had to decide between a number of applicants as to which of them was suitable for the grant of the fresh permit applied for. They took into consideration all the relevant matters and came to their decision which has not been attacked as partial or perverse. The only ground which survived before the Appellate Bench of the High Court was that the requirements of natural justice had not been satisfied. The only question that we have to determine is whether the Appellate Authority was justified in using the second report made by the police, though it had not been placed into the hands of the parties. That report did not directly contain any allegations against the first respondent. Hence there was nothing in that report which it could be called upon to meet. The only effect of the report was that many of the objections raised against the suitability of the appellant had been withdrawn by the police on further consideration of their records. The police report is more for the information of the authorities concerned with the granting of permits than for the use of several applicants for such permits. In our opinion, therefore the fact that the Appellate Authority had read out the contents of the police report was enough compliance with the rules of natural justice. We have also pointed out that no grievance was made at the time the Appellate Authority was hearing the appeal by any of the parties, particularly by the first respondent, that the second report should not have been considered or that they wished to have a further opportunity of looking into that report and to controvert any matter contained therein."

This decision is sufficient authority for the proposition that the revisory authority was under no obligation to give notice of its intended reference to the G.O. communicated to it by the State Government.

For the reasons given above, I cannot agree with the order of Rajagopalan, J., in having held that the order of the State Transport Appellate Tribunal was vitiated by reference to the G.O. or that it was not a relevant factor to be taken into account by the State Transport Appellate Tribunal or that it was based on a misconstruction of the order in W.P. No.18 of 1957. In my view this appeal has, therefore, to be allowed, but in the circumstances of the case, I would direct each party to bear his own costs.

Panchapakesa Ayyar, J.—This is an appeal by Swami Motor Transport, Ltd. Tanjore, the third respondent in W.P. No 467 of 1957, against the order of Rajagopalan, J., allowing the petition of Raman and Raman Ltd., Kumbakonam and issuing a writ of *certiorari* to set aside the order of the State Transport Appellate Tribunal, Madras, dated 13th May, 1957, revising the orders of the Regional Transport Authority, Tanjore, dated 26th July, 1956, rejecting the appellant's

1. (1957) S.C.J. 236 : (1957) M.L.J. (Cr.) 157 : 1957 S.C.R. 98 at 118.

2. (1952) S.C.J. 261 : (1952) 1 M.L.J. 806 : 1952 S.C.R. 583.

application for the variation of the route Tanjore to Kumbakonam as Tanjore to Koradachery *via*. Kumbakonam and Kodavasal in respect of the appellant's buses MDO 1081 and 1100, and granting the variation, despite the respresentations of Raman and Raman, Ltd., the petitioner in W.P. No. 467 of 1957.

The facts were briefly these : The appellant and Sri Rama Vilas Motor Service were running 11 buses and 6 buses respectively on the route Tanjore to Kumbakonam *via* Papanasam, covering a distance of 25 miles. Raman and Raman and Sri Rama Vilas Service were running 10 and 4 buses respectively from Kumbakonam to Tiruvarur *via* Kodavasal, a distance of 24 miles, Kodavasal lying in the middle of this route. There was no bus service from Kodavasal to Koradachery a distance of 7 miles, possibly because Koradachery was served from Tanjore directly by rail. In 1955 Raman and Raman applied for plying buses along a new route Kodavasal to Koradachery, not covered by buses till then. The proposed route was new, and it was dropped by the Regional Transport Authority, the competent authority, on 30th December 1955, in view of the Divisional Engineer, Highways, not recommending it, owing to the unsuitablity of the road to stand heavy traffic. Raman and Raman appealed to the State Transport Appellate Tribunal, against the order rejecting its petition, and the State Transport Appellate Tribunal, on 13th September, 1956, set aside the order of rejection and remanded the petition for fresh disposal by the Regional Transport Authority, in the light of the observations in its judgment.

Meanwhile, the appellant applied, on 4th January, 1956, to the Regional Transport Authority, Tanjore, for the variation of the route Tanjore to Kumbakonam for two buses, *viz.*, MDO Nos. 1081 and 1100, as Tanjore to Koradachery *via* Kumbakonam and Kodavasal. The usual procedure prescribed in the G.Os. like G.O. Misc. No 4912, Home, dated 18th December, 1950, and G.O. Misc. No. 382, dated 3rd February, 1956, was for the Regional Transport Authority, to first publish a notification under section 47 of the Motor Vehicles Act in order to hear representations made by members of the public, or by persons already providing road transport facilities along or near the proposed route or routes, or by any local authority or police authority within whose jurisdiction any part of the proposed route or routes lay, or by any association interested in the provision of transport facilities, in order to decide whether such a variation of the route should be granted, dealing with the application as if it were an application for a permit as provided under rule 208 of the Madras Motor Vehicles Rules, and give a decision as to whether the extension or the variation of the permit was in the interests of the public, and, if it gava a decision that it was in the interests of the public, to apply for administrative sanction of the varied or extended route from the Transport Commissioner, and then publish a notification under section 57 of the Motor Vehicles Act to deal with the particular application of the individual concerned, and to grant it to him or to others considered better fitted. In case, the Regional Transport Authority did not consider the variation or extension to be in the interests of the public generally, and therefore resolved not to recommend it, it would still publish a notification under section 57 of the Motor Vehicles Act in order to dispose of the particular application. In other words, the notification under section 47 was to decide *in general* whether the extension or variation applied for was necessary in the interests of the public and should be recommended, and the notification under section 57 was in order to dispose of the particular application and to decide, in case the variation or extension was recommended and approved, to whom the new or extended permit should be granted.

Section 57 (3) provides for representations against the grant of the extension or variation to the applicant. Section 57 (5) gives the person making the representation an opportunity of being heard either in person or by duly authorised representative. Section 57 (4) says that no representation in connection with an application referred to in sub-section (3) shall be considered *by the Regional Transport Authority* unless it is made *in writing before the appointed day* and unless *a copy thereof is furnished simultaneously* to the applicant by the person making such representation.

The Regional Transport Authority in this case published a notification under section 57 (3) regarding the appellant's application for variation and extension of

its permit for the two buses, *first* instead of the notification under section 47. Sri Rama Vilas Service sent a representation on 13th February, 1956, against the appellant's application for extension or variation. Raman and Raman claims before us to have sent a representation on 24th February, 1956, but could not show us a copy of the same nor could we trace the original or any reference to it in the file. The appellant's counsel strenuously denied that any such representation was sent. The Regional Transport Authority cancelled the notification under section 57, thus wrongly issued before the notification under section 47, and issued a notification under section 47. Raman and Raman, as well as Sri Rama Vilas Service, sent in representations against the need for the extension and variation. The Regional Transport Authority, Tanjore, at its hearing on 21st May, 1956, resolved as follows :

"Heard parties. Koradachery is connected by rail (23 miles) with Tanjore and by the proposed variation the distance will amount to 45 miles by bus. Further, existing facilities between Kumbakonam and Kodavasal are quite adequate and the proposed variation is not the best method of providing traffic facilities between Koradachery and Kodavasal in the public interest and hence variation not recommended."

After this resolution was passed, the Regional Transport Authority published another notification under section 57 (3) of the Act. Sri Rama Vilas Service made representations against the grant of the variation and extension to the appellant. It is out of the picture now. Raman and Raman did not make any fresh representation. According to Mr. M.K. Nambiar, its learned counsel there was an arrangement under which any transport company paying Rs. 8 per year was considered to be a *registered transport company* and was entitled to get *individual copies of all notifications*, and Raman and Raman had registered its name and paid the requisite subscription and had failed to get a copy of the second notification under section 57, and had, therefore, failed to make the representation to the second notification under section 57. This was a new contention, not set up before Rajagopalan, J., in this writ application though referred to vaguely in the affidavit of Raman and Raman in W.P. No. 18 of 1957, and so, we have not gone into it, as the necessary documents, etc., have not been exhibited and are not on record.

The Regional Transport Authority, at its sitting on 26th July, 1956, heard the application of the appllant and the representations received from Sri Rama Vilas Service, and rejected the appellant's application as it considered the grant of the variation and extension to be not in the interests of the public, for various reasons given by it. We are informed by the learned counsel on both sides that the resolutions passed by the Regional Transport Authority under section 47 are not communicated to the person making the application for variation or extension, or to the persons making representations against it, possibly because the resolutions are *administrative and general orders*, regarding the advisability or otherwise of the extension or variation sought for, and not orders on the petitions themselves, and the resolutions are to recommend or not the variation or extension, and for that reason also are kept uncommunicated, the final orders communicated being only those passed under section 57.

The order passed under section 57 rejecting the petition of the appellant was communicated to the appellant only on 10th August, 1956. But, as urged by Mr. Nambiar, the parties may have informal and irregular ways of coming to know from the office about the orders passed by the Regional Transport Authority, under section 47 or 57. So, according to Mr. Nambiar it is not surprising that Sri Varadan, M.L.A., Kumbakonam, and Sri Thyagaraja Pillai, M.L.A., Koradachery had, after the resolution, of the Regional Transport Authority on 21st May, 1956, not to recommend the appellant's application for extension or variation, and before the orders of the Regional Transport Authority on 26th July, 1956, under section 57 were passed, sent in petitions to the Government stating that direct transport facilities from Kumbakonam to Koradachery or from Tanjore to Koradachery *via* Kumbakonam and Kodavasal were essential in the interests of the public of Koradachery, a coconut and paddy centre, as the public were suffering from lack of such quick facilities for transport. On 6th August, 1956, after the Regional Transport Autho

rity had rejected the appellant's application on 26th July, 1956, and before it had communicated the order to him the appellant also sent a petition to the Government detailing its request before the Regional Transport Authority and requesting the Government to direct the Regional Transport Authority, Tanjore, for extending the existing service performed by its buses MDO Nos. 1081 and 1100 between Tanjore and Kumbakonam to Koradachery *via* Kodavasal. This application was presented to the Government by Mr. T. Chengalvarayan, counsel for the appellant, and specifically prayed for the exercise of the Government's powers under section 43-A (2) of the Motor Vehicles Act, as amended in 1954, for granting the prayer. According to Mr. Nambiar, the petition by two influential Congress M.L.As., Messrs. Varadan and Thyagaraja Pillai, to the Congress Ministry in power, were themselves not proper, though they did not request for the grant by Government of the specific request of the appellant, and the petition by the appellant requesting for the very same relief it had prayed for before the Regional Transport Authority and rejected by it under sections 47 and 57 of the Act was in the highest degree improper, and the Government should not have entertained such a petition from a party before a quasi-judicial tribunal like the Regional Transport Authority, especially when it knew that the party had a right of filing a revision petition before the State Transport Appellate Tribunal which right the party actually exercised a few days later. The State Transport Appellate Tribunal passed orders on 13th May, 1957, reversing the Regional Transport Authority's order dated 26th July, 1956 and forming the subject-matter of W.P.No. 467 of 1957 and this appeal.

The Government received the appellants application also, and called for the report of the Deputy Transport Commissioner, State Transport Authority, Egmore, on the petitions of Messrs. Varadan and Thyagaraja Pillai and the appellants. Sri Reghupathirao Naidu, the Deputy Transport Commissioner, submitted his report bringing to the notice of the Government specifically the fact of Raman and Raman having applied in 1955 itself for a permit to ply its buses on the new route Kodavasal to Koradachery, in extension of its route Kumbakonam to Thiruvarur *via* Kodavasal, and its rejection, and dealt with the conditions prevailing on the routes Tanjore-Kumbakonam, Kumbakonam-Tiruvarur *via* Kodavasal and the new route Kodavasal to Koradachery. He ended up by requesting the Government to pass suitable orders.

The Government then passed G.O. 3199, dated 16th November, 1956. In the preamble to it, the Government refers to the petitions of Sri Varadan and Sri Thyagaraja Pillai, M.L.As., and of the appellant, and to the report of the Deputy Transport Commissioner and says that it has carefully examined the representations *with reference to the conditions specified in section* 47 *of the Motor Vehicles Act*, and in consultation with the Transport Commissioner, Madras, has decided that *the route Tanjore to Kumbakonam* should be varied as Tanjore to Koradachery *via* Kumbakonam and Kodavasal in respect of two buses. In Paragraph 2, it says :

> " In exercise of the powers conferred by section 43-A (2) of the Motor Vehicles Act, 1939 (Central Act IV of 1939), the Government of Madras hereby directs the Regional Transport Authority, Tanjore, to vary the existing route, Tanjore to Kumbakonam, as Tanjore to Koradachery *vio* Kumbakonam and Kodavasal in respect of two buses. "

Copies of the G.O. were communicated to the Transport Commissioner, the Regional Transport Authority, Tanjore, the Regional Transport Officer, Tanjore, Messrs. Varadan and Thyagaraja Pillai and the appellant. No copy was communicated to Raman and Raman, Sri Rama Vilas Service though they were already operating on the Kumbakonam to Kodavasal route, a sector of the varied and extended route contemplated. Nor was notice given to either of them about the proposed extension of the route Tanjore to Kumbakonam to Koradachery *via* Kodavasal, and they were allowed to make their representations, including the representation that they were already running their buses from Kumbakonam to Tiruvarur *via* Kodavasal and were covering the sector of Kumbakonam to Kodavasal, which the appellant was not and that Raman and Raman had applied for the new route Kodavasal to

Koradachery, even in 1955, and had been refused it on the report of the Highways Engineer against such extension on technical grounds.

Mr. Nambiar has attacked the validity of this G.O. on the ground that notice was not given to Raman and Raman and Sri Rama Vilas Service, operators of a sector of the route, though the Government had purported to have complied with the requirements of section 47 making it obligatory to take into consideration any representation made by persons already providing road transport facilities along or near the proposed route, adding that they could not make any representations to the Government as they were not aware of the petitions of Messrs. Varadan and Thyagaraja Pillai and the appellant to the Government. Mr. Nambiar also pointed out that the Deputy Commissioner's report to the Government had clearly shown the interest of Raman and Raman as running over a sector, *viz* , Kumbakonam to Kodavasal, and as having applied for the new route Kodavasal to Koradachery earlier. He also stated that Raman and Raman could not even get a copy of the G.O. from the Regional Transport Authority to whom it was communicated, and had to apply to the Government for a copy and suffer very great delays, and that it finally got a copy and filed W.P.No.18 of 1957 in this Court for issuing a writ of *mandamus* or any other appropriate writ or other direction directing the State of Madras and the Regional Transport Authority, Tanjore, to forbear from enforcing G.O. Mis. No. 3199, dated 16th November, 1956. That writ petition was filed on 7th January, 1957. The appellant was the third respondent in that writ petition.

Rajagopalan, J., passed an order dated 2nd April, 1957, holding that in view of the fact that Raman and Raman, the petitioner, was plying 10 buses on the Kumbakonam to Kodavasal route, the major sector of the extension from Kumbakonam to Koradachery covering 19 miles, and that Sri Rama Vilas Service was also running 4 buses on that sector as against none by this appellant, the failure of the Government, especially in view of the report of the Deputy Transport Commissioner, showing the interest of Raman and Raman, etc., to give notice to Raman and Raman and an opportunity to make its representation against granting the extension and variation, vitiated the exercise of the jurisdiction the Government had under section 43-A (2) to extend the route from Kumbakonam to Koradachery, as section 43-A (2) also required the conditions stipulated in section 47 to be observed, and the principles of natural justice clearly required such a notice. In that view, he did not consider fully the question whether the Government was obliged to give notice to Raman and Raman and Sri Rama Vilas Service *even under the law and the rules*, under sections 43-A (2), 47 (1), etc., apart from the particular circumstances proved in the case making it obligatory to give Raman and Raman notice on *the principles of natural justice*. He, therefore, held that G.O.No.3199 was unlawful, and vitiated by the failure to give notice, but refused a writ of *mandamus*, as the Government had already issued the Government Order and no question directing it to direct the Regional Transport Authority, Tanjore, from giving effect to it arose, as the Regional Transport Authority could take into account *only lawful directions* given by the Government under section 43-A (1) or 43-A (2) of the Act, and that no writ of *mandamus* could issue to the Government directing it to cancel G.O. No. 3199 as it was issued in purported exercise of its *administrative control and authority*, and no question of issuing a writ of *certiorari* would arise, and no question of a writ of *prohibition* also, as that would be anticipating a wrong order by the Regional Transport Authority relying on the unlawful Government Order before such an order was passed. So, while declaring the Government Order to be unlawful and vitiated, and in excess of the Government's powers also, because it restricted the extension and variation to *two buses*, which it had no power to do and which only the Regional Transport Authority and other Transport Authorities could do, he dismissed the writ petition, though without costs.

On the very same day as the filing of the W.P. No. 18 of 1957 on 7th January, 1957, praying for restraining the Regional Transport Authority from giving effect to G.O. 3199, the Regional Transport Authority, Tanjore, issued a notification

under section 48-A of the Motor Vehicles Act stating that it was proposed to vary the permits of two buses belonging to the appellant and running from Tanjore to Kumbakonam to run from Tanjore to Koradachery *via* Kumbakonam and Kodavasal, in pursuance of G.O. 3199, and directing the appellant to file objections, if any, within three months from that date. No notice was sent to Raman and Raman or to Sri Rama Vilas Service, who were opposing the appellant's application, but notice was sent only to the appellant who was asking for the variation and extension. The appellant was granted the extension and variation in respect of two other buses, *viz.*, MDO Nos. 1959 and 1960, on 30th April, 1957. The appellant had applied on 18th November, 1956, two days after the Government Order, for such extension and variation in respect of his buses MDO Nos. 1081 and 1100, and it was in respect of buses MDO Nos. 1959 and 1960, since the matter relating to buses MDO Nos. 1081 and 1100 was pending in the revision petition by Raman and Raman before the State Transport Appellate Tribunal, and the revision petition was disposed of only on 13th May, 1957.

Raman and Raman filed W.P. No. 432 of 1957 against the extension and variation regarding bus Nos. 1959 and 1960. Though the appellant was running the two buses MDO Nos. 1081 and 1100, as well as the other two buses MDO Nos. 1959 and 1960, it was finally allowed by this Court only to run the two buses MDO Nos. 1959 and 1960 since even G.O. No.3199 allowed only two buses to run from Kumbakonam to Koradachery *via* Kodavasal, the appellant is still running those two buses. W.P. No. 432 of 1957 was eventually dismissed by this Court, as there was an *alternative remedy*, before the State Transport Appellate Tribunal, regarding the Regional Transport Authority's order dated 30th April, 1957, relating to bus Nos. 1959 and 1960. That matter is still pending before the State Transport Appellate Tribunal and those buses are, therefore, still running. It is stated by Mr. Nambiar that after the order of remand dated 13th September, 1956, passed by the State Transport Appellate Tribunal regarding the refusal of Raman and Raman's application for the route Kodavasal to Koradachery, the matter went up again before the Regional Transport Authority but was dismissed by it, as G.O. No. 3199 had permitted only two buses to run on that route and the two buses of the appellant had already been granted that route. Raman and Raman have taken the matter again to the State Transport Appellate Tribunal, and it is said to be pending there.

On 13th May, 1957, the State Transport Appellate Tribunal heard the appellant's petition against the order of the Regional Transport Authority, Tanjore, dated 26th July, 1956, rejecting its application for the variation of the route Tanjore-Kumbakonam to Tanjore to Koradachery *via* Kumbakonam and Kodavasal in respect of two buses, MDO Nos. 1081 and 1100. After referring to the previous history, and to G.O. No. 3199, the State Transport Appellate Tribunal reversed the order of the Regional Transport Authority and granted the variation applied for by the appellant in respect of the two buses MDO. Nos. 1081 and 1100. Sri Pushparaj, who constituted the State Transport Appellate Tribunal then, held that all the existing routes for getting to Koradachery from Tanjore or Kumbakonam for the travelling public were round-about and cumbersome, and the variation applied for by the appellant was the simplest and best to meet the needs of the travelling public of Kumbakonam or of any other place between Kumbakonam and Kodavasal and between Papanasam and Kumbakonam, to go to Koradachery, and that the variation asked for by the appellant was quiet reasonable, and was in the best interests of the travelling public, particularly of the people residing on the sector Kodavasal to Koradachery and between Kumbakonam and Kodavasal. But, instead of resting his order on this finding, he went on to say :

" Immediately after the Government Order was issued by the Government, Messrs. Raman and Raman filed a Writ Petition No. 18 of 1957 questioning the validity of this Government Order and prayed for the issue of a writ of *mandamus* directing the Regional Transport Authority, Tanjore, and the petitioner herein to forbear from enforcing the directions in the said Government Order. The High Court dismissed the writ petition, holding that the Government had powers to issue the said Government Order by virtue of section 43-A (2) of the Act, and the High Court refused to grant the writ of *mandamus* applied for by Messrs. Raman and Raman Ltd. "

The State Transport Appellate Tribunal had allowed Raman and Raman, which had not made any representation before the Regional Transport Authority under section 57 (3) of the Act, when the application was notified for a second time under section 57, to make a representation before it, and it considered its representation and even sent a copy of its order to it as if it was a party to the proceedings.

Against this order of the State Transport Appellate Tribunal, Raman and Raman filed W.P. No. 467 of 1957 on 27th May, 1957 urging various grounds for quashing the order of the State Transport Appellate Tribunal. The respondents were the State Transport Appellate Tribunal, the Regional Transport Authority Tanjore, and the appellant. That petition was hotly contested on the ground that the petitioners had no *locus standi* to file the writ petition, having not filed any representation under section 57 (3) of the Act and therefore not being entitled to be heard under section 57 (4) of the Act by the Regional Transport Authority or the State Transport Appellate Tribunal or this Court, and also challenging all the grounds raised by Raman and Raman against the State Transport Appellate Tribunal's order, like the State Transport Appellate Tribunal's taking into account evidence not before the Regional Transport Authority, like G.O. No. 3199 and the judgment in W.P. No. 18 of 1957 and misconstruing that judgment as holding the Government Order to be legal whereas it held it to be illegal and unlawful, and the invalidity of G.O. No. 3199, because of failure to give notice to Raman and Raman under the principles of natural justice in order to enable it to make representations, and all other grounds urged by Raman and Raman.

Rajagopalan, J., held that Raman and Raman had *locus standi* to file the writ, being aggrieved at the order of the State Transport Appellate Tribunal allowing the route to trade rival, thereby suffering financial loss, and held further that, whatever be the effect of section 57 (4) regarding the representations before the Regional Transport Authority the matter was different in this case, because the State Transport Appellate Tribunal had allowed Raman and Raman to file representations before it and had made it factually a party to the revision proceedings, and that, further, the writ jurisdiction of this Court was wider than the jurisdiction of the Regional Transport Authority or of the State Transport Appellate Tribunal and would give the petitioner, a person *aggrieved* at the order of the State Transport Appellate Tribunal *locus standi* to file such a petition. He also held that the State Transport Appellate Tribunal had taken into consideration G.O. No. 3199, as one of the relevant factors influencing its decision reversing the Regional Transport Authority's and that it had misconstrued the judgment in W.P. No. 18 of 1957 as holding that the Government had powers to issue the said Government Order by virtue of section 43-A (2) of the Act, whereas the judgment had actually held that the Government Order was vitiated and was unlawful because of lack of notice to Raman and Raman, and that the decision of the State Transport Appellate Tribunal had become vitiated by taking into consideration the Government Order which had been declared to be *ultra vires* by this Court and by misconstruing the High Court's decision on the point. So, on 8th November, 1957, he allowed the petition, issued a writ of *certiorari*, and set aside the orders of the State Transport Appellate Tribunal, dated 13th May, 1957, and directed the appellant to pay the costs of Raman and Raman. This appeal is against that order.

I have perused the records and heard the learned counsel on both sides and the learned Government Pleader for the Government. Mr. G. R. Jagadisan, learned Counsel for the appellant, attacked Rajagopalan, J.'s order as wrong and passed *without jurisdiction* as Raman and Raman had no *locus standi* to file the writ petition, and on *wrong grounds*, like G. O. No. 3199 being invalid and the State Transport Appellate Tribunal acting illegally in acting on it and misconstruing the judgment of Rajagopalan, J., in W.P. No. 18 of 1957 reported in *Raman and Raman, Ltd.* v. *The State of Madras*[1]. He wanted it to be set aside *in toto* and the State Transport Appellate Tribunal's order restored in full. The learned Government Pleader was only anxious that G. O. No. 3199, which, according

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1. (1957) 2 M.L.J. 76.

to him, was only a general order, and not one passed in favour of the appellant or any other person individually, should be held to be within the powers of the Government under section 43-A (2) of the Act and to be binding on all the transport authorities and tribunals, and should be held valid, despite failure of notice to Raman and Raman, before passing it. He urged that the Government was concerned only with this, and was not concerned with whether the State Transport Appellate Tribunal's order granting variation and extension to the appellant was confirmed or reversed or modified, or whether any other body, like Raman and Raman, was given the new route if they deserved it under the rules. Mr. M. K. Nambiar, learned counsel for Raman and Raman urged that Rajagopalan, J.'s order quashing the State Transport Appellate Tribunal's order was perfectly valid and ought not to be disturbed in the least, that G. O. No. 3199 was invalid *in toto* owing to the Government's acting improperly in receiving and acting on the representations of *a party before a Tribunal* like the Regional Transport Authority, constituted under the law, and that the State Transports Appellate Tribunal's order was vitiated by its misconstruction of the judgment of the Rajagopalan, J., in W.P. No. 18 of 1957, thinking that he had held that the Government had authority to issue the Government Order whereas he had held that the Government Order was illegal and *ultra vires*, and was also vitiated by the State Transport Appellate Tribunal taking new materials not before the Regional Transport Authority into consideration, like G. O. No. 3199 sanctioning a new route and filling up a lacuna and making it impossible for the route to be assigned to the appellant, and referring to the judgment of Rajagopalan, J., in W.P. No. 18 of 1957 and going wrong in its construction without giving notice to Raman and Raman, which had been allowed to make representations before it, that it was going to take these new facts into considerations. He urged that if notice had been given, Raman and Raman would have shown the Government Order to be invalid that it had been held to be invalid by this Court in W.P No. 18 of 1957, and would have prevented the misconstruction of the judgment in W.P. No. 18 of 1957 by the State Transport Appellate Tribunal . Of course, he urged that Raman and Raman had *locus standi* to file the writ petition, as it was *aggrieved* by the order of the State Transport Appellate Tribunal in granting the variation and extension to its rival which had come into the field later than itself, and had no sector qualification, like it, he urged also that Raman and Raman had been allowed by the State Transport Appellate Tribunal to make representations before it despite its failure to make representations before the Regional Transport Authority under the second notification under section 57, which failure too he attributed to the Regional Transport Authority's failure to send notice to Raman and Raman, *a registered transport concern* entitled to be given a copy of that notification.

I shall first discuss the question of *locus standi* of Raman and Raman to file the writ petition. Mr. Jagadisan urged that because Raman and Raman had failed to make a representation under section 57 (3) of the Act in reply to the second notification under section 57, no representation by it in connection with the appellant's application for extension and variation could be considered by the Regional Transport Authority under section 57 (4), and that, as the State Transport Appellate Tribunal had only the same jurisdiction as the Regional Transport Authority, it could not also consider any representation by Raman and Raman regarding the variation and the extension, and that the mere fact that it allowed it to make a representation before it *as an act of grace* would not make it a party to the proceedings or entitled to notice regarding new matters taken into consideration by the State Transport Appellate Tribunal, like G. O. No. 3199 and the Judgment in W.P. No. 18 of 1957, or make it have a legal or statutory grievance sufficient to file a writ because of alleged prejudice and loss caused by the State Transport Appellate Tribunal's order granting the appellant the variation and extension. He pointed out that the Supreme Court has laid down in *Veerappa Pillai* v. *Raman and Raman, Ltd and others*[1], as follows :

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1. (1952) S.C.J. 261 : (1952) 1 M.L.J. 806 : (1952) S.C.R. 583 at 595 and 596.

"The Motor Vehicles Act is a statute which creates new rights and liabilities and prescribes an elaborate procedure for their regulation. No one is entitled to a permit as of right even if he satisfies all the prescribed conditions. The grant of a permit is entirely within the discretion of the Transport Authorities and naturally depends on several circumstances which have to be taken into account. The Regional Transport Authority and the Provincial Authority are entrusted under section 42 with this power. They may be described as administrative bodies exercising quasi-judicial functions in the matter of grant of permits. . . . . . . There is a general provision of section 43-A that the Provincial Government may issue such orders and directions of a general character as it may consider necessary to the Provincial Transport Authority or a Regional Transport Authority in respect of any matter relating to road transport; and such transport authority shall give effect to such orders and directions. There is, therefore, a regular hierarchy of administrative bodies established to deal with the regulation of transport by means of a motor vehicle. Thus we have before us a complete and precise scheme for regulating the issue of permits, providing what matters are to be taken into consideration as relevant and prescribing appeals and revisions from subordinate bodies to higher authorities. The remedies for the redress of grievance or the correction of errors are found in the statute itself and and it is to these remedies that resort must generally be had. As observed already, the issue or refusal of permits is solely within the discretion of the transport authorities and it is not a matter of right."

Mr. Nambiar, for Raman and Raman, urged that these observations applied to the state of affairs *before the Constitution of India came into force* and have been changed or at least modified *after* the *Constitution came into force* as can be seen from the ruling of a Bench of this Court in *C.S.S. Motor Service* v. *State of Madras*[1], where Rajamannar, C.J., and Venkatarama Ayyar, J., as he then was, have held that, under the Indian Constitution, the right to carry on business is one of the freedoms expressly protected under Article 19(1) (*g*), and that the citizens have a right to ply motor vehicles on the public pathways and that any infringement of that right, even if it is by the Legislature, can be justified only if it falls within the scope of Article 19(6), and that the grant or refusal of permits by the transport authorities in all its stages, including an order under section 64-A, *is a judicial act*, and the Provincial Government should frame rules laying down the principles on which the selection from among the applicants is to be made, and such rules must be, as required by Article 19(6), reasonable and in the interests of the public, and the rules so laid down should be followed by all transport authorities, including the Government, acting under section 64-A without any discrimination and that the decision of the transport authorities granting or refusing to grant permits are liable to be reviewed by the Court and be set aside if they are unreasonable, arbitrary or discretionary. Mr. Jagadisan urged that this latter ruling has not affected the observations in *Veerappa Pillai* v. *Raman & Raman, Ltd., and others*[2], and has only added to them certain other observations. I agree, though the additions are very *significant* and affect the scope of original observations materially.

Mr. Jagadisan then relied on the rulings of Benches, of the Orissa High Court in *Raghunath Patnaik* v. *S. T. A. Orissa*[3], of the Rajasthan High Court in *Dholpur Co-operative T. & M. Union* v. *Appellate Authority*[4], and of the Nagpur High Court in *M. M. T. Association* v. *M. T. Service*[5], which have held that where a person has not filed a representation to the notification under section 57, he has no right to make any representations before the Regional Transport Authority against the application for the grant of the permit, and that he has no right to do so in appeal also, and argued from this that, as Raman and Raman has no legal or statutory right to make such a representation before the Regional Transport Authority or the State Transport Appellate Tribunal, it could not be deemed to have a statutory or legal grievance or to be "an aggrieved party" entitled to file a writ in this Court, whatever its financial loss might be by the permit being granted to its trade rival, and that the State Transport Appellate Tribunal's *act of grace* permitting Raman and Raman to make representations before it in the revision petition filed by the appellant would not take it a factual party, as held erroneously by Rajagopalan, J., and entitled to file a writ. He added that, as the Supreme Court has held in

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1. (1952) 2 M.L.J. 894 : I.L.R. (1953) Mad. 304.
2. (1952) 1 M.L.J. 806 : (1952) S.C.J. 261 : 1952 S.C.R. 583.
3. A.I.R. 1951 Orissa 81.
4. A.I.R. 1953 Raj. 193.
5. A.I.R. 1953 Nag. 150.

Charanjit Lal v. *The Union of India*[1], *The State of Orissa* v. *Madan Gopal Rungta*[2], *Harivishnu Kamath* v. *Syed Ahmed*[3], and *New Prakash Transport Co., Ltd.* v. *New Suvarna Transport Co., Ltd.*[4], even though writ can be issued under Article 226 for purposes other than the enforcement of fundamental rights, the concluding words of the Article have to be read in the context of what precede the same, and the *existence of a right* is the *foundation* of the exercise of the jurisdiction of the Court under this Article. He also relied on the ruling of the King's Bench in *ex parte Stott*[5], and urged that whether the order of the State Transport Appellate Tribunal, was reasonable or unreasonable, legal or illegal ,valid or invalid, Raman and Raman was not a person who was *aggrieved* under the law, and was, therefore, not entitled to apply for a writ of *certiorari*. He relied on Paragraph 265, Volume 11 of Halsburys' Laws of England (Third Edn.) and on the following observation therein :

> " Although the order is not of course, it will, though discretionary, nevertheless be granted *ex debito justitiae* to quash the proceedings which the Court has the power to quash where it is shown that the Court below has acted without jurisdiction, or in excess of jurisdiction, if the application is made by an aggrieved parcy and not merely by one of the public, and if the conduct of the party applying has not been such as to disentitle him to relief and this is the case even though *certiorari* is taken away by statute and though there is an alternative remedy."

He relied also on the Paragraph 119 of the same volume and on the following observations therein :

> " Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Court will not grant the order of *certiorari* on the ground that the inferior tribunal had misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute or admits illegal evidence or rejects legal evidence or misdirects itself as to the weight of the evidence or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

He also relied on the following passage in *Cases in Constitutional Law by Keir and Lawson*, (1954 Edn.) of pages 335 and 336 :—

> " Can a person entrusted with a discretion be held to surrender his discretion if he conforms to a policy or rules laid down by a superior authority or even the Government itself ? Obviously, if the superior authority or the Government embodies its policy or rules in legislation which it has power to make, the subordinate must obey. He does not suttender his discretion because the limits of his discretion have been changed. Otherwise, it seems that although he surrenders his discretion and acts ineffectually, if he actually obeys the order of a superior (*Simons Motor Union, Ltd.* v. *Minister of Labour*[6], he acts lawfully and effectually if he conforms freely to the policy of the Government."

He relied also on a ruling of a Bench of this Court consisting of Rajamannar, C.J., and Rajagopala Ayyangar, J., in *Anjaneya Motor Transport* v. *State of Madras*[7], where it has been held that simply because a person makes a representation beyond time, he does not become in any sense a party to the proceedings entitled to notice and hearing of the revision or appeal, and that the knowledge of the appellate or revisional authority as to the existence of a person whose rights may be affected has really no bearing upon right of such a person to notice.

After a very careful consideration of the entire matter, I have no doubt whatever that Raman and Raman had *locus standi* to file the Writ Petition No. 467 of 1957, as held by Rajagopalan, J. The Supreme Court has held in the *Harivishnu Kamath* v. *Syed Ahmed and others*[3], that a writ of *certiorari* will issue when an inferior Court or tribunal acts without jurisdiction or in excess of it or fails to exercise it ; (2) when it acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates, the principles of natural justice ; and (3) when there is a manifest error apparent on the face of the proceedings, *e.g.*, when its decision is based on clear ignorance, or disregard of the provisions of law. As found in the passages from Halsbury quoted above, *any aggrieved party* can file a writ. I cannot agree with Mr. G. R. Jagidisan's

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1. (1951) S.C.J. 29 : (1950) S.C.R. 869 : A.I.R. 1951 S.C. 41.
2. 1952 S.C.R. 28.
3. (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157 : (1955) 1 S.C.R. 1104.
4. (1957) S.C.J. 236: (1957) M.L.J. (Crl.) 157 : (1957) S.C.R. 98.
5. L.R. (1916) 1 K.B. 7.
6. (1946) 2 All E.R. 201.
7. (1955) 2 M.L.J. 376.

contention that the grievance, though real, cannot be recognised if it is not a *statutory* grievance. Nor can I agree with Mr. Nambiar that any member of the public even *without a grievance* can file a writ. This latter contention will lead to extraordinary results. If it is accepted, any Court-bird can file a writ attacking the correctness of a judgment in which he is not interested in the least. Mr. Nambiar urged that writs by any citizen can be allowed attacking the legality and validity of a cabinet. This is somewhat doubtful. In In re *P. Ramamurthi*[1], a writ by a citizen and a legislator against the nomination of Sri C. Rajagopalachariar and three others of the Madras Legislative Council, was held to be not maintainable by a Bench of this Court. The Bench remarked that infringement of mere political rights in general was no ground for the issue of a writ and that a personal individual grievance was essential. That is why in the passages from Halsbury, we find the phrase " if the application is made by an aggrieved party and not merely by one of the public ".

Mr. Jagadisan's contention that a grievance must not only exist but must be *statutory* to enable an aggrieved person to file a writ does not also appeal to me. That will be extending the theory of *damnum sine injuria* beyond justifiable limits. Unless a statute says that a particular injury will not be recognised as an injury, the grievance will still be a legal grievance. Here, no statute says like that. All that section 57 (4) of the Motor Vehicles Act says is that no representation in connection with an application referred to in sub-section (3) shall be considered by the *Regional Transport Authority* unless it is made in writing before the appointed day and unless a copy thereof is furnished simultaneously to the applicant by the person making representation. It specifically prohibits only the Regional Transport Authority to consider such representations. It does not even prohibit the appellate or revisional authority, the State Transport Appellate Tribunal, or the Government, from considering such representations themselves, if made to them. So, even if I hold against Mr. Nambiar's contention that Raman and Raman did make a representation under section 57 (3) on 24th February, 1956, in answer to the first notification under section 57, because though alleged by Raman and Raman in its affidavit in W.P. No. 18 of 1957 and not specifically refuted by the appellant, there is no sufficient proof of it, still the fact remains that Raman and Raman did make a representation to the appellant's application in answer to the notification under section 47 and might be excused for not knowing that a second notification under section 57 would follow. This is a curious case where the Regional Transport Authority erroneously published the notification under section 57 first, and then the notification under section 47, and then again another notification under section 57. Again, there is the fact that though the Regional Transport Authority's resolution dated 21st May, 1956, under section 47, not to recommend the variation or extension applied for by the appellant, was not communicated officially to the appellant or to Raman and Raman or to Sri Rama Vilas Service, I agree with Mr. Nambiar that all the parties must have known about it unofficially from the Regional Transport Authority's office, and that Messrs. Varadan and Thyagaraja Pillai put in their petitions to the Government recommending the route refused to be recommended by the Regional Transport Authority, and the appellant put in his petition later on, and Raman and Raman rested happy and inactive because the Regional Transport Authority had not recommended the extension and variation asked for by the appellant. Naturally, Raman and Raman would not have expected any different order from the Regional Transport Authority, under section 57, even if it had suspected that a second notification under section 57 would issue. As it expected, the Regional Transport Authority, by its order dated 26th July, 1956, rejected the application of the appellant for the variation and the extension. Raman and Raman must have known about this too, and must have been doubly lulled into inactivity thereafter. Raman and Raman was not proved to be aware of the petitions of Messrs. Varadan and Thyagaraja Pillai and by the appellant to the Government. No notice was given to it regarding them, nor could it have expected a petition by a party, in a matter directly pending before a quasi-judicial tribunal, like the

1. (1952) 2 M.L.J. 671 : A.I.R. 1953 Mad. 94.

Regional Transport Authority, to be entertained by the Government, as it would have been improper. Again, when the appellant filed a revision petition before the State Transport Appellate Tribunal to set aside the order of the Regional Transport Authority rejecting its application for variation and extension, Raman and Raman, coming to know of it, intervened and was allowed by the State Transport Appellate Tribunal to make its representations against the appellant's revision petition. Though Mr. Jagadisan urged that the State Transport Appellate Tribunal had no jurisdiction to to do so, and that, even if it had jurisdiction, it was only *an act of grace* and would not make Raman and Raman a party to the proceedings, there is no doubt in my mind that the State Transport Appellate Tribunal had ample powers to allow Raman and Raman to make representations in the revision petition, especially when the representations were in support of the order sought to be set aside, and the State Transport Appellate Tribunal must also be presumed to have the inherent power to allow such representations by parties interested, in the absence of any provision of law prohibiting it. The scheme of the Motor Vehicles Act is to invite objections and representations and not to stifle them. Each case has to be decided on its own facts. The State Transport Appellate Tribunal had, as Rajagopalan, J., held, made Raman and Raman *factually* a party to the revision petition, and had even communicated a copy of its order to it. I do not think that the State Transport Appellate Tribunal was so strictly bound by section 57 (4) as to make the prohibition therein regarding the Regional Transport Authority hearing any representation applicable to the State Transport Appellate Tribunal also. Such penal clauses must be strictly construed. As held in *Veerappa Pillai* v. *Raman and Raman, Ltd., and others*[1], relied on by Mr. G. R. Jagadisan himself, the Regional Transport Authority and the State Transport Appellate Tribunal are administrative bodies exercising quasi-judicial functions in the matter of the grant of permits, and as held in *C. S. S. Motor Service* v. *State of Madras*[2], relied on by Mr. Nambiar, the grant or refusal of permits by the transport authorties in all its stages is a judicial act, and the decisions of the transport authorities granting or refusing to grant permits are liable to the reviewed by this Court and set aside, if they are unreasonable, arbitrary or discriminatory. As the State Transport Appellate Tribunal was a quasi-judicial body, and its order in revision a judicial act, it follows that its admitting additional evidence, like Government Order 3199 and the judgment in W.P. No. 18 of 1957, without notice to Raman and Raman, which it had allowed to intervene and make representations, entitled Rajagopalan, J., at the instance of Raman and Raman, the aggrieved party, to issue a writ of *certiorari* on the grounds mentioned in *Harivishnu Kamath* v. *Syed Ahmed and others*[3], as the decision of the State Transport Appellate Tribunal, upsetting the Regional Transport Authority's decision, and relying on Government Order 3199 and the judgment in W.P. No. 18 of 1957, without giving an opportunity to Raman and Raman to be heard, violated the principles of natural justice, and the State Transport Appellate Tribunal also committed a manifest error apparent on the face of the proceedings in construing Rajagopalan, J.'s judgment in W.P. No. 18 of 1957 as holding that the Government had a valid right to issue Government Order 3199 whereas, Rajagopalan, J., had held just the contrary, and had held the Government Order to be illegal, because of want of notice to Raman and Raman, Sri Rama Vilas Service, etc., and the violation of the principles of natural justice.

Mr. Jagadisan then relied on the conduct of Raman and Raman disentitling it from filing the writ. This was a belated contention based on the passage from Halsbury cited above, that a writ of *certiorari* will issue only if the conduct of the party applying has not been such as to disentitle him to relief. I see nothing in the conduct of Raman and Raman, by which is meant its not filing representations before the Regional Transport Authority in answer to the second notification under section 57, disentitling it from getting a writ of *certiorari*. So, I hold that Raman and Raman had *locus standi* to file the writ.

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1. (1952) S.C.J. 261 : (1952) 1 M.L.J. 806 : 1952 S.C.R. 583.
2. (1952) 2 M.L.J. 894 : I.L.R. (1953) Mad. 304.
3. (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157 : (1955) I S.C.R. 1104.

The next contention of Mr. Jagadisan was that, even so, the order of the State Transport Appellate Tribunal did not deserve to be quashed, as it had not misconstrued the judgment of Rajagopalan, J., in W.P. No. 18 of 1957, and, even if it had miscon trued it, it had not relied on it as one of the important pillars for its judgment but had only mentioned it as *one of the reasons*, and because it was bound to obey the directions in Government Order 3199, or at least, the general direction therein sanctioning the new route from Kodavasal to Koradachery and the extension of the route from Kumbakonam to Kodavasal, in consultation with the Transport Commissioner. I cannot agree. The State Transport Appellate Tribunal did misconstrue the judgment of Rajagopalan, J., in W.P. No. 18 of 1957 regarding the validity of Government Order 3199. Rajagopalan, J., who delivered the judgment in W.P. No. 18 of 1957, was himself the Judge who disposed of W.P. No 467 of 1957 now under appeal, and he considered in his judgment in this writ petition his finding regarding Government Order 3199 in his judgment in W.P. No 18 of 1957 and held, quite rightly, that he had held Government Order, 3199 as vitiated, invalid and illegal in W.P. No. 18 of 1957, whereas the State Transport Appellate Tribunal had remarked that the High Court held in W.P. No. 18 of 1957 that the Government had powers to issue the said Government Order by virtue of section 43-A (2) of the Act, just the reverse of what was held actually. Thus, the State Transport Appellate Tribunal committed a manifest error apparent on the face of the proceedings regarding the finding in W.P. No. 18 of 1957 concerning Government Order 3199, and this error was based on clear ignorance, and, so Rajagopalan, J., was perfectly justified in issuing a writ of *certiorari.*

As regards the argument that the entire Government Order 3199, was binding on the State Transport Appellate Tribunal, that also cannot be upheld. It is only a valid Government Order that will be binding on the quasi-judicial tribunals constituted under the Motor Vehicles Act, and not invalid Government Orders or invalid parts of Government Orders. Rajagopalan, J., had in W. P. No. 18 of 1957, refused a writ of prohibition to the Regional Transport Authority to provide for any anticipated breach of its legal obligations, as he did not expect it to treat Government Order 3199, held by him to be illegal and invalid at least in parts, as wholly legal and valid. As Mr. Nambiar rightly urged, if the State Transport Appellate Tribunal had not, out of ignorance, misconstrued the judgment of Rajagopalan, J., in W.P. No. 18 of 1957 as holding Government Order 3199 to be valid, and within the powers of the Government under section 43-A (2) of the Act, it is inconceivable that it would have differed from the finding of Rajagopalan, J., and held it to be wrong, and acted on the Government Order as valid, whatever the powers of this Bench might be to do so. I shall later on discuss how far, in my opinion, Government Order 3199 would be valid even though notice was not given to Raman and Raman and Sri Rama Vilas Service. I entirely agree with Rajagopalan, J., that it was certainly not valid when it restricted the extension and variation to two buses. I would also held that it was invalid in another respect, *viz.*, in extending the route Tanjore-Kumbakonam, held by the appellant, without considering the advisability of extending the route Kumbakonam to Kodavasal, held by Raman and Raman and Sri Rama Vilas Service though the latter would be the more natural thing to do, as it formed part of the sector.

Mr. Jagadisan urged that as the State Transport Appellate Tribunal had relied on the judgment in W.P. No. 18 of 1957, misconstruing *it, only as one of the reasons* for its order for setting aside the order of the Regional Transport Authority and for granting the appellant the extension and variation sought for, and as it was not clear that this reason had influenced it materially, there was no need for Rajagopalan, J., to interfere and quash the State Transport Appellate Tribunal's order by issuing a writ of *certiorari.* This argument cannot hold good. A Bench of this Court, consisting of Rajamannar, C.J., and Somasundaram, J., has held in W.A. No. 35 of 1955 as follows :—

" In our opinion, the principle enunciated by Rajagopala Ayyangar, J., in that decision applied to this case and that principle is this : " When more than one reason is given and when one of them, which from the language of the order appears to be substantial and has been taken into consideration, it is impossible for the court to sustain the order on the ground that it was really the valid reason that

effectively operated to bring about the decision and not the invalid one. This principle has the high authority of the Judicial Committee in *Li Hong Mi* v. *Attorney-General for Hongkong*[1].

For relying on the misconstrued judgment in W.P. No. 18 of 1957 alone, the State Transport Appellate Tribunal's order deserves to be quashed, as it was an error apparent on the face of the record and it materially influenced it in arriving at its decision.

But there was another vital error committed by the State Transport Appellate Tribunal, *viz.*, its relying on the invalid portions of Government Order 3199. Mr. Jagadisan could not, of course, urge that the State Transport Appellate Tribunal should have held the Government Order to be legal and valid, despite Rajagopalan, J.'s finding to the contrary. He could only urge that the State Transport Appellate Tribunal was entitled to ingnore the Government Order and the judgment in W.P. No. 18 of 1957 and proceed to dispose of the revision petition on other grounds. But that was not what the State Transport Appellate Tribunal, did, and this argument will not, therefore, help Mr. Jagadisan in this appeal.

There was a third error committed by the State Transport Appellate Tribunal, *viz.*, in acting on new materials not before the Regional Transport Authority, like Government Order 3199 and the judgment in W.P. No. 18 of 1957, for deciding the revision petition. Mr. Jagadisan urged that Rajagopalan, J., had in several writ petitions including the one under appeal, held that when the existence of the new material was known to the other party, the failure to give notice to the party before using it will not vitiate the judgment. I cannot agree. A Bench of this Court, consisting of Rajamannar, C.J., and Somasundaram, J., has held, in W.A. No. 35 of 1955, that the reception of such new evidence without notice to the party affected and giving it an opportunity of rebutting any adverse statement contained therein, or inference therefrom, would vitiate the judgment. The Bench held it in an appeal from the judgment of Rajagopalan, J., himself, and set aside the observation of Rajagopalan, J., to the contrary. The learned Chief Justice relied on the decision of the King's Bench in *Rex* v. *Architects' Registration Tribunal ex parte Juggar*[2], where it was held that it was improper for a tribunal which acted in a quasi-judicial capacity to consider and give weight to evidence contained in such documents. Mr. Jagadisan urged that in the case in the writ appeal, the new material consisted of electric bills, *etc.* and not a mere judgment of this Court and of a Government Order as in this case, and, so, the judgment in the writ appeal would not apply to the facts of this case, and that Government Orders and judgments of this Court are not really *new materials* and that even learned Judges of this Court use rulings not intimated to either side for supporting their decisions. I cannot agree. Even regarding judgments and inference drawn therefrom, in my opinion, parties must be given an opportunity to have their say. It is well-known that judgments can be construed rightly or wrongly, and, at any rate, differently. Even in this case, the learned counsel on either side have construed certain judgments differently in their own favour. I, for one, would therefore, not advocate even judges using rulings to support their decisions without bringing them to the notice of the parties and hearing what they have to say about them. In my opinion, the principle *audi alteram partem* the corner-stone of both law and natural justice, requires it. Government Order 3199 was admitted not to have been published in any gazette, and Mr. Nambiar vehemently urged that not only Raman and Raman had no notice of it, when it was issued, but could not even get a copy of it for a long time after it was issued.

Then it was urged by Mr. Jagadisan that Government Order 3199 was issued by the Government in exercise of its powers under section 43-A (2) and that this Government Order was *an administrative order* as held by Rajagopalan, J., himself, and was not liable to be held to be invalid, in whole or in part, by this Court. He relied on the ruling of Rajagopalan, J., himself in W.P. Nos. 259, 757 and 758 of 1955 to that effect, and also on the rulings of a Bench of the Hyderabad High Court in *M. Anantaramiah* v.

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1. L.R. (1920) A.C. 735.
2. (1945) A.E.R. Vol. II, p. 131.

R. Venkata Ratnam[1], on the Full Bench ruling of the Allahabad High Court in *Mahbulunnissa* v. *Union of India*[2], and on the Bench rulings of the Allahabad High Court in *Jyoti Sarup* v. *Board of Revenue, U. P.*[3], *Ramaesh Chandra* v. *Principal, B. B. I. College* [4], and *Keshab Chandra* v. *Inspector of Schools*[5], and on the second passage from Halsbury quoted already, and urged that Rajagopalan, J., should not have interfered with the order of the State Transport Appellate Tribunal, however wrong in law and in fact, when it was based on the administrative order contained in Government Order 3199 which it was bound to obey and implement. I cannot agree. The State Transport Appellate Tribunal, being a *quasi-judicial* tribunal, like the Regional Transport Authority, was bound to obey only lawful Government Orders and not invalid Government Orders or invalid parts of Government Orders. Rajagopalan, J., had not interfered with Governm'nt Order 3199 itself and issued a writ of *mandamus* or *certiorari* to the Government about it. He had in fact dismissed W.P. No. 18 of 1957, praying for a writ against the Government. But when a *quasi judicial tribunal* like the State Transport Appellate Tribunal, acted on the invalid Government Order, he rightly interfered by way of a writ of *certiorari* and quashed the order of the State Transport Appellate Tribunal. That he had the right, and, indeed, the duty to do. None of the rulings relied on by Mr. Jagadisan would prevent it.

Mr. Jagadisan's contention that Raman and Raman, having failed in W.P. No. 18 of 1957 and having not appealed against it, should not be allowed to agitate against the findings of Rajagopalan, J., regarding the admission of new material known to the party, the Government Order being an administrative order, etc., will not hold good. As Rajagopalan, J.'s views in this matter have been overruled by a Bench of this Court in W.A. No. 35 of 1955, Raman and Raman can, under the law, rely on the Bench ruling in favour of its contentions.

Then Mr. Jagadisan urged that Mr. Nambiar was wrong in contending that the State Transport Appellate Tribunal should not have granted the appellant the extension and the variation, as there was no administrative sanction for the extended and varied route by the Transport Commissioner, as required by the Government Orders referred to above, as that was merely *an administrative detail* with which Courts are not concerned, and the Regional Transport Authority and the State Transport Appellate Tribunal had ample power to allow the extension and variation even in the absence of a recommendation to the Transport Commissioner by the Regional Transport Authority, and approval by him of the variation and extension, and that, in this case, Government Order 3199 specifically allowed the extension and variation *after consultation with the Transport Commissioner*, and that part of the Government Order would hold good, and the State Transport Appellate Tribunal could pass fresh orders in the revision petition in the place of the order quashed by Rajagopalan, J. Mr. Nambiar urged that this argument was wrong, and that this Court has no power in a writ petition *to remand* that matter for fresh disposal, or to direct the State Transport Appellate Tribunal to re-hear the matter and give a fresh decision, and that the State Transport Appellate Tribunal could not grant the variation and extension without the Transport Commissioner's having granted administrative sanction, any more than a house which does not exist can be rented out to a tenant by a Court. He also contended that in this writ appeal we cannot consider the legality and validity of Government Order No. 3199 in whole or in part. I am of opinion that this Court has got the right to consider the decision of Rajagopalan, J., about the validity of Government Order 3199 or any part of it, as urged by Mr. Jagadisan, though the State Transport Appellate Tribunal had no such power.

The Government, no doubt, committed three grave errors when passing Government Order 3199. Firstly, it entertained, in my opinion, improperly, a petition from the appellant regarding extension and variation for its two buses when the matter was pending before the Regional Transport Authority and the

1. A.I.R. 1953 Hyd. 228.
2. A.I.R. 1953 All. 477 (F.B.).
3. A.I.R. 1953 All. 25.
4. A.I.R. 1953 All. 30.
5. A.I.R. 1953 All. 623.

State Transport Appellate Tribunal, though it may be that the appellant had known about the rejection of its petition by the Regional Transport Authority. While the Government had powers under section 43-A (2) to open any new route, like the route from Kodavasal to Koradachery or to extend any existing route, like the Tanjore—Kumbakonam route to Kodavasal or Koradachery, or the Kumbakonam—Kodavasal route to Koradachery, or to permit additional stage carriages or to reduce the number of stage carriages on any specified route, under section 42-A (2), as urged by Mr. Jagadisan, it had no right to say that *two buses* alone should ply on the extended or varied or new route. That was a matter for the Regional Transport Authority and the State Transport Appellate Tribunal to decide. Nor did it have the power to take a petition from a party whose petition was pending before the quasi-judicial tribunals, and by-pass those quasi-judicial tribunals by passing orders itself without even giving notice to Raman and Raman and Sri Rama Vilas Service, who were providing road transport facilities along or near the proposed route. Nor did it have the power to decide for itself that only the Tanjore—Kumbakonam route, held by the appellant should be extended to Koradachery, and not the Kumbakonam—Kodavasal route held by Raman and Raman and Sri Rama Vilas Service. By entertaining the application of the appellant when its petition for extension and variation was pending before the Regional Transport Authority and the State Transport Appellate Tribunal, and by disposing of the application in a way favourable to it by extending the route Tanjore—Kumbakonam to Koradachery and by restricting it to two buses, the Government had acted improperly, and especially when there was no notice to Raman and Raman and Sri Rama Vilas Service, and the State Transport Appellate Tribunal, by acting on the illegal, invalid and improper Government Order 3199 had rendered its order in revision liable to be quashed by Rajagopalan, J., No doubt, the Government did not order the two buses to be given to the appellant. But, in the context that is what it intended to do, and the Regional Transport Authority's notice dated 7th January, 1957 to the appellant and its peculiar wording would show it. The Government had no doubt, power, even without notice to any one, to sanction the new route Kodavasal—Koradachery. Mr. Nambiar urged that the Highway Engineer had not recommended that route as it was not fit for bus traffic. But that reason is unconvincing at any rate now. Not only had Raman and Raman applied for that route, and has a revision petition still pending before the State Transport Appellate Tribunal about the rejection of its application, but the appellant is now running two buses daily along that route. The proof of the pudding is in the eating and the running of the two buses from Kodavasal to Koradachery for the past so many months proves the fitness of the route for buses to run on it.

Mr. Nambiar urged that portions of the Government Order 3199 cannot be separated, and the sanction of the new route Kodavasal to Koradachery held valid. Mr. Jagadisan contended that it can be done. I agree with Mr. Jagadisan. The test is whether the valid part makes sense and is separable, viable and sustainable. The Federal Court has observed in *Shyamakant Lal* v. *Ram Bhajan Singh*,[1] relied on by Mr. Jagadisan as follows:

> "It is well-established principle that if the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseverably connected with it, then only such part is invalid, unless, of course, the whole object of the Act would be frustrated by the partial exclusion. If the subject, which is beyond the legislative power, is perfectly distinct from that which is within such power, the Act can be *ultra vires* in the former while *intra vires* in the latter. The test is said to be whether the statute with the in valid portions omitted would be substantially a different law as to the subject-matter dealt with by wh at remains from what it would be with the omitted portions forming part of it. See *Rex* v. *Commonw ealth Court of Conciliation and Arbitration*[2]".

Applying that test, it is clear to me that the portion of Government Order 3199 which sanctioned the new route Kodavasal—Koradachery "in consultation with the Transport Commissioner" (which recital is not attacked by Mr. Nambiar as false) will be valid, as it is separable, viable and sensible, while the portions relating to the extension of

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1. (1938-39) F.L.J. (F.C.) 183 : (1939) 2 M.L.J. (Sup.) 45 : 1939 F.C.R. 193 and 213.

2. (1910) 11 C.L.R. 1 at 27.

the Tanjore—Kumbakonam route to Koradachery, instead of the Kumbakonam—Kodavasal route to Koradachery, and the restriction of the varied and extended route to *two buses* alone will be invalid, as interfering with the jurisdiction of the Regional Transport Authority and the State Transport Appellate Tribunal in a matter pending before them and, without even issuing notices to the affected parties.

So, I agree with Rajagopalan, J.'s quashing in W.P.No. 467 of 1957 the State Transport Appellate Tribunal's order in revision, but would direct the State Transport Appellate Tribunal *to hear the matter afresh* and give a fresh decision in the revision petition, after hearing the representations of Raman and Raman about W.P. No. 18 of 1957 and G.O. No. 3199 the new materials, and acting only on the valid portion of G.O. No. 3199, namely, the sanction of the new route Kodavasal—Koradachery, and deciding for itself, whether the Tanjore—Kumbakonam route should be extended to Koradachery, or the Kumbakonam—Kodavasal route, should be extended to Koradachery, and to whom the new route or the extension should be granted.

I agree with Mr. Jagadisan that this Court has got the power *even in a writ petition*, and even after quashing the order of the subordinate Court or tribunal, to direct the matter to be re-heard and decided afresh by it, and differ from Mr. Nambiar. The King's Bench has held in *Rex* v. *Northumberland Compensation Appellate Tribunal, Ex-parte Shaw*[1], relied on by Mr. Jagadisan as follows :

"The Court of the King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an *appellate* capacity, but in a *supervisory* capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which on the face of it offends against the law. The King's Bench does not substitute its own views for those of the tribunal as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over the tribunals in this way, it is not usurping the jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had."

In my opinion, these observations will apply in full to the powers of a High Court, in India, in writ petitions.

So, I would confirm Rajagopalan, J.'s order in the writ petitions and dismiss the appeal and would direct the State Transport Appellate Tribunal to dispose of the Revision Petition afresh, but would direct all the parties to this appeal, in the peculiar circumstances, to bear their own costs. Advocate's fee Rs. 250.

As we have delivered differing judgments in W.A. No.125 of 1957, the matter may be placed before the Honourable the Chief Justice for nominating a third Judge to hear the matter.

When the appeal came on for hearing before the third Judge (*Balakrishna Ayyar, J.*) in view of the difference of opinion, the following Order was made by

Balakrishna Ayyar J.—At this stage I am inclined to take the view which does not completely coincide either with that of A. S. Panchapakesa Ayyar, J. or Basheer Ahmed Sayeed, J.

This means that it will not be possible to have a majority opinion in accordance with which A.S. Panchapakesa Ayyar, J. and Basheer Ahmed Sayeed, J., can dispose of the appeal. As required by clause 36 of the Letters Patent, the papers will be placed before the Honourable the Chief Justice so that if he thinks fit to do so, a Bench may be constituted whose opinion will enable the appeal to be finally disposed of.

Pursuant to the aforesaid order this writ appeal was heard by a Full Bench (*Rajamannar, C.J., Ramachandra Ayyar* and *Ganapathia Pillai, JJ.*).

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1. L.R. (1952) 1 K.B. 338 at pages 346-347.

The Solicitor-General of India (*C.K. Daphtary*) for *K.V. Venkatasubramania Iyer, T.R. Ramachandran, G. Ramaswami* and *S.M. Subramaniam*, Advocates for the Appellant.

The Attorney-General of India (*M.C. Setalwad*) for *M.K. Nambiar* and *M. Natesan*, Advocates for the first Respondent.

The Additional Government Pleader (*M.M. Ismail*) on behalf of Respondents 2 and 3.

The Judgment of the Court was delivered by

Rajamannar C.J.—This is an appeal from the Writ Petition No. 467 of 1957 filed under Article 226 of the Constitution in the following circumstances. The appellants before us, Messrs. Swamy Motor Transport (Private), Limited, held permits to ply buses on the route Tanjore to Kumbakonam. They applied on 4th January, 1956, for a variation of the route to enable them to run two of their buses MDO 1081 and MDO 1100, from Tanjore to Koradachery *via* Kumbakonam and Kodavasal. On receipt of this application the Regional Transport Authority published a notification under section 57 (3) of the Motor Vehicles Act. There are two other operators on the route Kumbakonam to Kodavasal, namely, M/s. Raman and Raman and Sri Rama Vilas Service Limited. Sri Rama Vilas Service sent a representation opposing the grant of variation. Raman and Raman allege that they also sent a representation but that has not been traced. It was pointed out that according to the procedure laid down by the Government, when an application for variation was received, there should first be a notification under section 47 of the Act. The original notification under section 57 (3) was therefore cancelled and a notification under ssection 47 of the Act was published on 14th March, 1956. Both Raman and Raman and Sri Rama Vilas Service sent in representations urging that there was no need for the extension and variation. On 21st May, 1956, the Regional Transport Authority, Tanjavur resolved not to recommend the variation. The following is the resolution :

"Heard parties. Koradachery is connected by rail (23 miles) with Tanjore and by the proposed variation the distance will amount to 45 miles by bus. Further, existing facilities between Kumbakonam and Kodavasal are quite adequate and the proposed variation is not the best method of providing traffic facilities between Koradachery and Kodavasal in the public interest and hence variation not recommended."

The Regional Transport Authority thereafter published on 31st May, 1956, a formal notification under section 57 (3) regarding the application made by the appellants for the variation. Sri Rama Vilas Service made representation against the grant of the variation but M/s. Raman and Raman do not appear to have filed afresh any such representation. On 26th July, 1956, the Regional Transport Authority hearing the appellants and the representations received from Sri Rama Vilas Service rejected the appellants' application as it considered that the grant of the variation and extension was not in the interests of the public. The order itself appears to have been communicated to the appellants on or about 10th August, 1956. The appellants applied to the State Transport Appellate Authority for a revision of the order of the Regional Transport Authority. Meanwhile two members of the Madras Legislative Assembly addressed two letters to the Minister for Transport requesting the Minister to provide through facilities between Tanjore and Koradachery *via* Kumbakonam and Kodavasal as early as possible in the interests of the travelling public. There was no mention in these two letters of the application for the variation made by the appellants. The Appellants themselves filed a petition in the Ministry for Transport praying that the Regional Transport Authority, Tanjore, may be directed to extend the existing service performed by their buses Nos. MDO 1081 and 1100 from Tanjore to Koradachery *via* Kumbakonam and Kodavasal. It is sufficient to say at this stage that there was no reference to this petition in the application made by them to the Regional Transport Authority. The appellants' petition to the Government was dated 6th August, 1956. This was after the Regional Transport Authority had passed the order rejecting the appellants' application

though technically the order had not been communicated to the appellants till four days later. The Government appear to have communicated a copy of the petition to the Deputy Transport Commissioner, State Transport Authority, Egmore, for report. That officer after a full enquiry brought to the notice of the Government that the Regional Transport Authority, Tanjore, had rejected the application made by the appellants and against its order the appellants had preferred a revision petition to the State Transport Appellate Tribunal, Madras, and the matter was *sub judice*. The officer did not make any positive recommendation but left it to the Government to decide whether any variation should be granted. Thereupon the Government passed an order on 16th November, 1956 (G.O. Ms. No. 3199) which runs as follows :

"Representations have been made to Government that the Public are put to great inconvenience for want of through travel facilities between Koradachery and Kumbakonam, that there is no bus service on the sector between Kodavasal and Koradachery, a distance of about 7 miles, that if one wants to go to Koradachery one has either to go to Tiruvarur and then come by bus to Koradachery in a round about way or has to go to Nidamangalam, catch the train there and then go to Koradachery. It has also been represented that there are five trains up and down on the route Tanjore to Nagapattinam (*via*) Nidamangalam, Koradachery and Tiruvarur, that they are not sufficient to serve the needs of the public and that additional bus facilities are quite essential between Kumbakonam, Tanjore and Koradachery (*via*) Kodavasal. It was therefore suggested that the existing route Tanjore to Kumbakonam may be varied as Tanjore to Koradachery (*via*) Kumbakonam and Kodavasal. The Government have carefully examined the representations with reference to the conditions specified in section 47 of the Motor Vehicles Act and in consultation with the Transport Commissioner, Madras, have decided that present route Tanjore to Kumbakonam should be varied as Tanjore-Koradachery (*via*) Kumbakonam and Kodavasal in respect of two buses.

2. In exercise of the powers conferred by section 43-A (2) of the Motor Vehicles Act, 1939 (Central Act IV of 1939) the Government of Madras hereby direct the Regional Transport Authority, Tanjore, to vary the existing route Tanjore to Kumbakonam as Tanjore to Koradachery (*via*) Kumbakonam and Kodavasal in respect of two buses."

Raman and Raman filed a petition under Article 226 of the Constitution (Writ Petition No. 18 of 1957) to issue a writ of *mandamus* directing the State of Madras and the Regional Transport Authority, Tanjore, to forbear from enforcing the above Government Order. That petition was disposed of by Rajagopalan, J., by his order dated 2nd April, 1957. He dismissed the petition on the ground that no writ of *mandamus* could be issued to the State because it had nothing further to do to give effect to the directions given in the said order and that no writ of *mandamus* could issue to the Regional Transport Authority in anticipation of a refusal by that authority to consider the objections preferred by the petitioner before him. Nevertheless the learned Judge examined at length the validity of the Government Order. His views may be briefly set out as they have a bearing on the contentions urged before us.

(1) The Government in their above Order did not purport to grant expressly to the appellants herein a variation for their two buses.

(2) The Government exceeded their jurisdiction conferred on them by section 43-A (2) when they purported to limit the use of a portion of the extended route, Kumbakonam to Koradachery, to two buses.

(3) The failure of the Government to give an opportunity to Raman and Raman to make his representations vitiated the exercise of the jurisdiction which the Government had to extend the route up to Koradachery, because, it offended the principles of natural justice. The learned Judge commented on the fact that the appellants before us had failed to disclose the pendency of the proceedings before the Regional Transport Authority with reference to the very two buses mentioned by them to the Government and that susequently the Government were made aware of the proceedings by the Deputy Commissioner in his report. The Government were also made aware that there were objections to the proposal to extend the route from Kumbakonam to Koradachery.

On 13th May, 1957, the State Transport Appellate Tribunal passed an order on the revision petition filed by the appellants before us, setting aside the order of the Regional Transport Authority and directing the authority to grant the variation applied for by the appellants in respect of two buses, MDO 1081 and 1100. It is

to quash this order that the writ petition out of which this appeal arises was filed by Messrs. Raman and Raman (Private) Limited.

As it is this order of the State Transport Appellate Tribunal which is the subject of controversy, we shall deal with it in some detail. The Appellate Tribunal after giving a brief history of the case at the outset referred to the two letters of two Members of the Legislative Assembly to the Government and to the petition by the appellants themselves. He then set out the gist of the order of the Government dated 16th November, 1956, which has been extracted in full, earlier in this judgment. The Tribunal then referred to Writ Petition No. 18 of 1957 and to the dismissal of the said petition. He understood the High Court to have held therein that the " Government had powers to issue the said G. O. by virtue of section 43-A (2) of the Act ". He did not mention the other important expression of opinion of Rajagopalan, J., that the said order of the Government was contrary to principles of natural justice as it was passed without notice to M/s. Raman and Raman. The Tribunal then went on to deal with the facts and circumstances bearing on the variation sought by the appellants. In his opinion the variation applied for was the most simple and the best to meet the traffic needs of the travelling public of Kumbakonam or any other place between Kumbakonam and Kodavasal and between Papanasam and Kumbakonam to go to Koradachery. He concluded thus :

" On a careful consideration of all the materials and contemtions and the representations, I feel satisfied that the variation asked for by the petitioner is quite reasonable and is in the best interests of the travelling public particularly of the people residing on the sector Kodavasal and Koradachery and between Kumbakonam and Kodavasal."

Rajagopalan, J., allowed Writ Petition No. 467 of 1957 and set aside the order of the Appellate Tribunal dated 13th May, 1957, on the sole ground that the Tribunal was in error when it took into account G.O. Ms. No. 3199 dated 15th November, 1956, as one of the relevant factors to be considered and that vitiated its final decision. A preliminary objection was raised before the learned Judge that the petitioners before him, namely, M/s. Raman and Raman were not entitled to invoke the jurisdiction vested in this Court by Article 226 of the Constitution inasmuch as they had failed to oppose the application of Swamy Transport, the appellants, at the proper stage ; but he overruled the objection. He held that the petitioner was a person aggrieved by the order of the Tribunal which conferred a benefit on the appellants to his detriment. Raman and Raman had been allowed to participate in the revision petition before the Tribunal and their objections were considered and rejected. In such circumstances Raman and Raman must be deemed to have been a party to the proceedings before the Tribunal and aggrieved by its order. After analysing the order of the State Transport Appellate Tribunal the learned Judge came to the definite conclusion that the Tribunal did take the Government Order above referred to as a relvant factor in determining the question in issue before it. As the G. O. was an irrelevant factor and that was taken into consideration by the Tribunal, the exercise of the jurisdiction of the Tribunal was vitiated on that ground.

Messrs. Swami Motor Transport Ltd., have filed the above appeal against the order of Rajagopalan, J. The appeal originally came on before a Division Bench of this Court consisting of Panchapakesa Ayyar, J. and Basheer Ahmed Sayeed, J. The learned Judges differed and delivered long and elaborate judgments in support of their respective views. Panchapakesa Ayyar, J., held that Rajagopalan, J.'s order should be confirmed. The learned Judge further directed the State Transport Appellate Tribunal to dispose of the revision petition filed by Messrs. Swami Motor Transport afresh. Basheer Ahmed Sayeed, J., disagreed with Rajagopalan, J., and held that the order of the Appellate Tribunal was not vitiated by reference to the Government Order. It was a relevant factor to be taken into account. The Tribunal's order was not based on a misconstruction of the order in Writ Petition No. 18 of 1957. In his view the appeal should be allowed and Rajagopalan, J.'s order set aside. On the question as to the legality and validity of the Government Order,

the learned Judges were not in agreement. According to Panchapakesa Ayyar, J., the Government Order was not valid but Basheer Ahmed Sayeed, J., thought that it was perfectly valid. As the two learned Judges differed, the appeal was referred to a third learned Judge, Balakrishna Ayyar, J. After listening to learned counsel for sometime Balakrishna Ayyar, J., passed the following Order :—

"At this stage I am inclined to take a view which does not completely coincide either with that of A. S. Panchapakesa Ayyar, J. or Basheer Ahmed Sayeed, J.

This means that it will not be possible to have a majority opinion in accordance with which A. S. Panchapakesa Ayyar, J. and Basheer Ahmed Sayeed, J., can dispose of the appeal. As required by clause 36 of the Letters Petent, the papers will be placed before the Honourable the Chief Justice so that if he thinks fit to do so, a Bench may be constituted whose opinion will enable the appeal to be finally disposed of."

Hence the appeal comes for disposal before this Full Bench.

At the outset we shall dispose of a preliminary point raised on behalf of the appellants by the learned Socilictor-General, namely, that Raman and Raman who applied to this Court for the issue of a writ of *certiorari* to quash the order of the State Transport Appellate Tribunal was not a person aggrieved by that order. The ground on which this objection was based is that Raman and Raman had not made a representation opposing the variation which was notified under section 57(3) of the Motor Vehicles Act. It must not, however, be overlooked that when the notification under section 47 of the Act was published, a representation *was* filed by Raman and Raman on 30th March, 1956. In effect this was a representation against the application made by Swami Motor Transport Limited, for variation. As mentioned above, there was first a notification under section 57 which was cancelled, and then a notification under section 47 and again a notification under section 57. Even assuming that technically it was necessary for Raman and Raman to have made a representation at each stage with reference to each notification, there can be no doubt that substantially they did make a representation opposing the variation. This we think is the most material circumstance in deciding whether Raman and Raman could invoke the jurisdiction of this Court under Article 226. In our opinion, Raman and Raman were certainly persons aggrieved by the order of the Appellate Tribunal sought to be quashed. They had not only filed a representation, after the notification under section 47, they were even allowed to put forward their view before the State Transport Appellate Tribunal. The fact that they were heard by the Appellate Tribunal itself shows that they were treated as persons aggrieved. In discussing the question when an applicant for a writ of *certiorari* can be said to be a person aggrieved, the Earl of Reading, C.J., observed thus in *Rex* v. *Richmond* confirming *Ex parte Howitt*[1] :

"The applicant does not, in my opinion, stand in the same category as a member of the public who may be said to have only a general interest in seeing that the law is properly carried out. He had a particular interest in this subject-matter, and nothing can better show this than the fact that he incurred the expense of instructing counsel to secure if he could the refusal of the confirmation and to contend that the confirming authority had no jurisdiction. Bearing in mind that the applicant is a person who was entitled to appear and object as having this interest that he was carrying on business as the licensee of premises in Richmond, I think the case comes within the decision of *Rex* v. *Groom, Ex parte Cobbold*"[2].

The learned Chief Justice quoted the following from the Judgment of Lord Alverstone, C.J., in that case :

"It is sufficient if they have a real interest in the decision of the Justices, and they have in this case. They took the point now raised before the Justices at the adjourned general annual licensing meeting and when the confirming order was made, and it would be too strong to say that they had not a sufficient interest in the matter to enable them to apply for the rule."

The true principle is to determine whether the applicant has an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered. Obviously Raman and Raman had such an interest. It was Raman and Raman who had filed Writ Petition No. 18 of 1957, challenging the validity of the Government Order. We overrule this objection.

The main question appears to us to lie within a very narrow compass, namely, whether the impugned order of the State Transport Appellate Tribunal is vitiated

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1. L.R. (1921) 1 K.B. 248 at page 253. 2. L.R. (1901) 2 K.B. 157.

by any manifest error of law. The learned Solicitor-General contended that the Tribunal was a quasi-judicial authority which was competent to decide whether or not an applicant should be granted a variation. That matter was solely within the jurisdiction of the transport authority and the Appellate Tribunal was a revisional authority. The Tribunal had on a consideration of all the circumstances decided that the variation was in the interests of the public. On that finding it was proper to grant the variation. With reference to Government Order Ms. No. 3199 dated 16th November, 1956, which the Tribunal mentioned in its order, the learned Solicitor-General's contention was twofold:—(1) that even assuming that the Government Order was bad, the order of the Tribunal cannot be quashed, because, the Tribunal's order is not based entirely on the Government Order. The Tribunal had not completely surrendered his judicial functions to the Government Order as binding him to come to only one conclu ion. It will be wrong to say that the Tribunal was even influenced by the Government Order and (2) the Government Order itself is not bad or unlawful for any reason. The Government had not exceeded their powers under section 43-A (2) of the Act in passing it.

The learned Attorney-General appearing for the contesting respondents, Messrs. Raman and Raman, contended that it is really unnecessary to decide for a disposal of this appeal whether the Government Order was invalid or unlawful. The Government Order should not have been taken into account by the Appellate Tribunal in deciding the question before him. The Appellate Tribunal must have been influenced by the Government Order. In any event one cannot be certain whether and how far he was actually so influenced. The learned Attorney-General, however, was prepared to convince us that the Government Order was *ultra vires* and invalid.

The first question which falls for decision is whether a consideration of the Government Order by the State Transport Appellate Tribunal was improper. We agree with Rajagopalan, J., that it was. The Tribunal was invested with appellate and revisional powers in respect of orders by the Regional Transport Authority. It was not a mere administrative or executive body. It should only deal with what may be generally described as "evidence on record" though it may be that the Tribunal is not governed strictly by the sections of the Indian Evidence Act. The Government Order cannot be said to be a piece of evidence. It embodied the decision of the Government as a Statutory authority. It was passed without hearing any one except on considering the petitions from the two Members of the Legislative Assembly and Messrs. Swami Motor Transport Limited. It was the duty and function of the Tribunal to come to a decision on the material on record which had been placed before the Regional Transport Authority, which was the subject-matter of the revision petition before it. It is obvious from a reading of the Tribunal's order that it attached importance to the fact that the Government had taken a particular view of the very question which he had to decide.

The learned Solicitor-General referred us to a passage in S.A. De Smith's Judicial Review of Administrative Action at pages 203-204, *viz*:

> "It is, of course, immaterial that an authority may have considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters."

But for an entire statement of the law on the point the following further passage is also material:

> "The influence of extraneous matters will be manifest if they have led the authority to make an order that is invalid *ex facie*, or if the authority has set them out as reasons for its order, or has otherwise admitted their influence. In other cases, the Courts must determine whether their influence is to be inferred from the surrounding circumstances. If the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence; it seems to be enough to prove that their influence was substantial."

Reliance was placed by the learned Attorney-General on the well-established principle that when several reasons are given for coming to a particular conclusion, if some of the reasons are bad, the conclusion cannot stand. It is sufficient to refer to a judgment of this Court in Writ Appeal No. 35 of 1955 to which one of us was a party. There we agreed with the principle as enunciated by Rajagopala Ayyangar, J., in the following terms:

> "When more than one reason is given and when one of them which from the language of the order appears to be substantial and has been taken into consideration, it is impossible for the Court

to sustain the order on the ground that it was really the valid reason that effectively operated to bring about the decision and not the invalid one."

We pointed out that this principle has the high authority of the Judicial Committee in *Li Hong Ni* v. *Attorney-General for Hongkong*[1]. In the pressnt case it cannot be said that the Appellate Tribunal has given the order of the Government as one of the reasons for arriving at his decision. The underlying basis of the principle however will apply. If among several matters taken into consideration there is a matter which is irrelevant or extraneous, and the Tribunal must have been influenced by such irrelevant or extraneous matter also, then the order must be quashed because it cannot be determined what the Tribunal would have held if such matter had been excluded.

We are also of opinion that G.O. Ms. No. 3199 dated 16th May, 1956, was itself not a valid and proper order. As we have seen above, that order was passed on two petitions from two Members of the Madras Legislative Assembly and a petition from Swami Motor Transport Ltd. Having regard to the prayer in the petition of Swami Motor Transport Ltd., namely, that the Government may be pleased to direct the Regional Transport Authority, Tanjore, for extending the existing service performed by buses Nos. MDO 1081 and 1100 between Tanjore-Kumbakonam to Koradachery *via* Kodavasal, we are of the opinion that the Government were virtually directing the Regional Transport Authority to grant the variation prayed for by Swami Motor Transport. It is true that the Government Order does not mention Swami Motor Transport, nor does it mention the numbers of the two buses. The order purports to be under section 43-A (2) of the Motor Vehicles Act. That provision is as follows :—

"The State Government may, on a consideration of the matters set forth in sub-section (1) of section 47, direct any Regional Transport Authority or the State Transport Authority to open any new route or to extend an existing route or to permit additional stage carriages to be put, or to reduce the number of stage carriages, on any specified route."

Though it cannot be said that the order of the Government is not in accordance with this provision, in the circumstances we think that the power under this provision has been used to compel a quasi-judicial tribunal like the Regional Transport Authority to dispose of a case in a particular way. What the Government has done is, to quote the words of the Supreme Court in *Raman and Raman* v. *State of Madras*[2], " to couch the order in a general way to induce a tribunal to come to a particular decision in a given case. . ."

We cannot refrain from expressing our surprise at the complete suppression by Swami Motor Transport of their having applied to the Regional Transport Authority for the same variation which they sought from the Government. Actually by the date of their petition the Regional Transport Authority had passed an order rejecting their application. It was said that the order was communicated only on 10th August, 1956, implying that Swami Motor Transport were not aware of the rejection of their application by the Regional Transport Authority. If this, be so they were gulity of a very high impropriety. When their application had been heard by and was pending the decision of the Regional Transport Authority, they approached the Government to influence the Regional Transport Authority to decide their case in their favour. The order passed by the Government in such circumstances cannot be held to be valid.

During the course of the argument it was brought to our notice that the Deputy Transport Commissioner had referred in his report to the rejection of the application of Swami Motor Transport by the Regional Transport Authority and the revision petition filed by them to the State Transport Appellate Tribunal. The Deputy Transport Commissioner used the word " *sub judice* " to describe the state of affairs. The Government were therefore presumably aware that a competent authority had rejected the application of Swami Motor Transport and a revision petition was pending before a statutory tribunal. Without making any reference to these material matters, what in effect the Government purported to do was to forestall

1. L.R. (1920) A.C. 735.
2. (1959) S.C.J. 1156 at p. 1161 : (1959) 2 M.L.J. (S.C.) 236.

any decision by the Appellate Tribunal adverse to Swami Motor Transport. This is another ground on which we are prepared to hold that the Government Order was not valid.

There is the further reason which was dealt with by Rajagopalan, J., in Writ Petition No. 18 of 1957, namely, that the order was passed without giving an opportunity to Raman and Raman to make their representation.

Though for these reasons we hold that G. O. Ms. No. 3199 dated 16th November, 1956, was not valid, we desire to express our dissent from the view of Rajagopalan, J., that Government have no power under section 43-A (2) to specify the number of buses to ply on a new route or an existing route as extended by them. They can on a consideration of relevant circumstances indicate to the transport authorities that on a particular route a specified number of stage carriages would be adequate to meet the needs of the travelling public. This however does not affect the decision of this appeal.

It follows that the State Transport Appellate Tribunal not only took into account an irrelevant and extraneous matter in coming to a decision, he took into account something which was neither legal nor valid. The order of the Appellate Tribunal is therefore vitiated by a manifest error of law and it was rightly quashed by Rajagopalan, J.

Rajagopalan, J., did not expressly say what should happen after the order had been quashed. But Panchapakesa Ayyar, J. directed the State Transport Appellate Tribunal to dispose of the revision petition of Swami Motor Transport afresh after hearing the interested parties including Messrs. Raman and Raman. We agree that this is the proper course. The appeal is dismissed but with a direction to the above effect. There will be no order as to costs.

V.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Manavar Basha and others .. *Petitioners**

v.

V. Narayanan and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (2)—*Order of eviction passed under for default in payment of rent—Sale of property subsequently—Tenant attorning to the purchaser—Whether constitutes fresh tenancy so as to render original order of eviction inexecutable.*

Transfer of Property Act (IV of 1882), *section* 109—*Attornment by tenant—Effect.*

The purchasers of an immoveable property in the occupation of a tenant get transferred to themselves all the rights of the lessor under section 109 of the Transfer of Property Act and are entitled to enforce an order of eviction obtained by their vendor against the tenant. The attornment of the tenant to the purchaser has no impact on the lease except for the substitution of one landlord for another and the terms and incidents of the lease continue to operate as before the attornment. It does not bring about a new tenancy or lease.

An attornment is the act of recognising a new landlord and is a continuation of the existing lease in all other respects. What constitutes a fresh contract of lease between the parties is a question of fact to be determined on the facts and circumstances of each case. But a mere attornment to a new landlord as purchasers of the property or the filing a fresh application for eviction by the purchasers or the institution of a suit for recovery of the arrears of rent by the purchasers cannot individually or collectively constitute a fresh tenancy agreement between the purchasers and the tenant after the purchase and it is open to the purchasers to execute the order of eviction obtained by the previous landlord, their vendor.

Petition praying under section 115 of Act V of 1908 and section 12-B of Madras Act XXV of 1949 and Act VIII of 1951 praying the High Court to revise the order of the City Civil Court, Madras, dated 2nd May, 1959 and made in E.P. No. 305 of 1959 in H.R.A. No. 213 of 1957.

* C.R.P. No. 870 of 1959. 31st May, 1960. (10th day of Vaisakha, 1882-Saka).

The Advocate-General (*V. K. Thiruvenkatachari*) and *V. C. Viraraghavan*, for Petitioners.

K. Rajah Iyer, *P. S. Chinnappa* and *K. Hariharan*, for Respondents.

The Court delivered the following

JUDGMENT.—One Halima Bi was the owner of the premises bearing old Door No. 110-E, New Door No. 110-F, Mount Road, Madras . The premises was in the occupation of her tenant, one V. S. Naryanan who will hereinafter be referred to as the tenant on a rental of Rs. 500 per month. He defaulted to pay the rent for the months of March, April and May, 1956. Halima Bi filed on 29th June, 1956, H.R.C. No. 2380 of 1956, before the House Rent Controller, Madras, under section 7 (2) (*i*) of the Madras Buildings (Lease and Rent Control) Act, 1949, for eviction of the tenant on the ground that the tenant commited wilful default in the matter of payment of rent for the aforesaid three months. The tenant admitted non-payment of the rent for the said period but however pleaded that he had adjusted the rent towards the cost of repairs and white-washing done to the premises as per the alleged agreement between him and Halima Bi. The Additional Rent Controller, Madras, found that the tenant was guilty of wilful default in not paying the rent for the months of March and April, 1956 and ordered eviction by order, dated 25th April, 1957. The tenant filed an appeal against the said order, H. R. A. No. 213 of 1957, on the file of the Court of Small Causes, Madras.

Pending the appeal H.R.A. No. 213 of 1957, Halima Bi sold the premises to the two minor sons of A. K. Basha Sahib, Munawar Basha and Anwar Basha for a consideration of Rs. 90,000 under a registered conveyance, dated 24th October, 1957. In the said transaction of sale the two minor purchasers were represented by their father and guardian A. K. Basha Sahib. On the same day 24th October, 1957, Halima Bi wrote to her tenant informing him of the sale and requesting him to attorn to the purchasers and pay the monthly rent of Rs. 500 to them thereafter. A. K. Basha Sahib acting as guardian of his two minor sons, the purchasers, also sent a notice on 24th October, 1957, to the tenant intimating him of the purchase and requesting him to attorn to the purchasers from the date of sale and to pay the rent in furture to the purchasers. On receipt of these letters, one from Halima Bi and the other from her purchasers, the tenant wrote the following letter, dated 26th October, 1957, to the purchasers :

> " We hereby attorn the tenancy to you in respect of the above property on a monthly rent of Rs. 500 from 24th October, 1957, since you have purchased the said property from Messrs. Halima Bi and Saminullah and you are the present owners."

Saminullah is the son of Halima Bi and he had no right, title or interest in the property at any time.

The purchasers filed on 13th January, 1958, an application I.A. No. 109 of 1958 in the Court of Small Causes, Madras, in the pending appeal, H.R.A. No. 213 of 1957 for being impleaded as respondents in the said appeal. An affidavit in support of the application was filed by the guardian, A.K. Basha Sahib in which it was averred as follows in paragraph 3 :

> " Even prior to the purchase the prior owner Halima Bi had obtained an order of eviction against the appellant herein and advised that the minor purchasers could take advantage of the said order of eviction."

This application was resisted by the tenant, but eventually by order of Court, dated 24th March, 1958, the purchasers were impleaded as party-respondents in the appeal H.R.A. No. 213 of 1957, on the file of the Court of Small Causes, Madras.

The purchasers next took the step of filing on 15th April, 1958, the petition H.R.C. No. 1468 of 1958 on the file of the House Rent Controller, Madras, seeking eviction of the tenant on the ground of wilful default in the matter of payment of rent that accrued due subsequent to their purchase and other grounds. While this application for eviction was pending, the appeal H.R.A. No. 213 of 1957 came on for hearing and was disposed of on 27th October, 1958, by the appellate

authority, which confirmed the order of eviction passed by the Additional House Rent Controller on 25th April, 1957. The tenant was however granted three months time for vacating the premises.

H.R.C. No. 1464 of 1958 on the file of the House Rent Controller, Madras, the application for eviction filed by the purchasers against the tenant was dismissed for default on 27th February, 1959. The purchasers filed I.A. No. 188 of 1959 on 12th March, 1959, to set aside the dismissal for default alleging grounds for non-appearance on 27th February, 1959, when the application was dismissed for default of appearance. On the same day, 12th March, 1959, the purchasers also filed a Civil Suit, O.S. No. 815 of 1959, on the file of the City Civil Court, Madras, against the tenant for recovery of a sum of Rs. 8,125 said to be rent due for the premises for the period from 24th October, 1957, the date of the purchase to 1st March, 1959. In paragraph 6 of the said plaint it was averred as follows :

" The proceedings before the House Rent Controller and the appeal against the said order terminated on 27th October, 1958, when the defendant's appeal was rejected and the eviction order wa confirmed. The plaintiffs are instituting execution proceedings in respect o f such eviction order."

The plaint also referred to some correspondence between the purchasers and the tenant prior to the institution of the suit. It appears from the allegations in the plaint that the tenant was putting forward a plea that the rent due for the premises was not Rs. 500 per month as claimed by the purchasers but only a sum of Rs. 350 per month as per alleged order of fixation of fair rent said to have been fixed by the House Rent Controller in H.R.C. No. 503 of 1956 by Order, dated 3rd April, 1958.

In this state of affairs the purchasers, who had already got themselves impleaded as party-respondents in H.R.A. No. 213 of 1957, on the file of the Court of Small Causes, Madras, filed an execution petition E.P. No. 305 of 1959 on the file of the City Civil Court, Madras, to obtain delivery of the premises in execution of the order of eviction passed by the House Rent Controller on 25th April, 1957 and confirmed by the appellate authority on 27th October, 1958. This Execution Petition was filed on 14th March, 1959 and an order for delivery was obtained *ex parte* on 17th March, 1959. On 19th March, 1959, the purchasers obtained delivery of three rooms, a portion of the premises, but could not obtain possession of the entire premises obviously due to the obstruction caused by the tenant. Thereafter the tenant filed E.A. No. 256 of 1959 before the City Civil Court, Madras, to set aside the order of delivery in E.P. No. 305 of 1959 and also filed E.A. No. 311 of 1959 for ordering re-delivery of the three rooms taken possession of by the purchasers in execution of the warrant of delivery. The tenant also resisted further execution in E.P. No. 305 of 1959 on the ground that the order for eviction passed by the House Rent Controller and affirmed by the appellate authority had become inexecutable and null and void by reason of events that happened subsequently between the parties. These applications were heard together by the learned City Civil Judge, Madras, who passed a common order therein, dated 2nd May, 1959. He held as follows :

" Having regard to the facts of this case and the conduct of the purchasers themselves it can only be that the purchasers understood the arrangement between them and the tenant on 24th October, 1957, as a fresh tenancy and that they therefore filed a fresh eviction petition on the strength of the fresh lease. In these circumstances I am inclined to think that the purchasers cannot file E.P. No. 305 of 1959 on the strength of the first eviction order in H.R.C. No. 2380 of 1956 confirmed in H.R.A. No. 213 of 1957. . . . . On a consideration of all the facts of this case I hold that the eviction order in H.R.C. No. 2380 of 1956 confirmed in H.R.A. No. 213 of 1957 is not executable. In the result E.A. No. 258 of 1959 to set aside the order of delivery in E.P. No. 305 of 1959 is allowed and the E.P. No. 305 of 1959 shall stand dismissed. The re-delivery of the three rooms prayed for in E.A. No. 311 of 1959 is ordered. Time one month."

The purchasers have filed the above Civil Revision Petition against the said order, challenging the legality and propriety of the order under section 12-B of the Madras Buildings (Lease and Rent Control) Act, 1949. The first respondent in the petition is the tenant and the second respondent is the original owner, Halima Bi.

The question for consideration in this Civil Revision Petition is whether the order for eviction passed by the House Rent Controller, Madras, on 25th April, 1957, which was affirmed by the appellate authority on 27th October, 1958, had become inexcutable or in any way rendered null and void and incapable of execution. The main contention urged on behalf of the tenant (the first respondent herein) before the learned City Civil Judge was that a fresh tenancy or lease was constituted between himself and the purchasers by reason of the events which happened subsequent to the purchase. This contention was accepted by the learned City Civil Judge and the learned counsel appearing for the first respondent before me reiterated the same contention. The elements constituting a fresh tenancy between the purchasers and the tenant are stated to be first the attornment as evidenced by the correspondence between the purchasers and the tenant (*vide* letters, dated 24th October, 1957 and 26th October, 1956) : secondly the institution of an application for eviction, H.R.C. No. 1464 of 1958 and thirdly, the institution of a civil suit, O.S. No. 815 of 1959 on the file of the City Civil Court, Madras, for recovery of rent due based upon the fresh tenancy.

The learned Advocate-General, appearing for the purchasers the petitioners herein, contended that the acts relied upon by the first respondent cannot constitute in law a new tenancy or lease between the purchasers and the tenant, and therefore the conclusion of the Court below that there was a new lease and that the order for eviction became inexecutable cannot be sustained.

The purchasers are the transferees of the reversion of the lease by Halima Bi in favour of the tenant. Under section 109 of the Transfer of Property Act the transferee of the reversion the purchasers herein, automatically get transferred to themselves all the rights of the lessor, Halima Bi. It is obvious that the purchasers are entitled to enforce the order for eviction obtained by Halima Bi against the tenant. How far does the attornment by the tenant to the purchasers affect the purchasers' statutory rights under section 109 of the Transfer of Property Act is the point to be considered.

I shall first deal with the legal effect of attornment on the rights of the parties. What is attornment? The dictionary meaning of the word is "Transfer; legal acknowledgment of new landlord" (*Oxford dictionary*). It is an overt act by which the tenant acknowledges and accepts the new person as the landlord in the place of the old landlord. It has no impact on the lease except for the substitution of one landlord for another and the terms and incidents thereof continue and operate. It does not bring about a new tenancy or lease; nor does it destroy the existing one, or alter the rights and obligations of the lessor and the lessee prevaliing at the moment of the attornment.

In a very early English decision, *Cornish* v. *Searell*[1], Holroyd, J., observed :

"The attornment is the act of the tenant's putting one person in the place of another as his landlord."

Halsbury in his Laws of England, Volume 23, Third Edition, age 406, observes as follows :

"Where the occupier is a tenant and agrees to hold of a new landlord during the currency of the agreement without any change in the terms of the tenancy, this is a mere attornment."

Earl Jewitt in the *Dictionary of English Law*, page 178, deals with the subject of attornment as follows :

"Attornment is the agreement of the owner of a particular estate in land to become the tenant of a person who has acquired the estate next in reversion or remainder, or the right to the rent or other services by which the land is held (Coke on Littleton 312-*a*). Thus if *A*, being entitled to land in fee simple, grants a lease of it to *B*, then *B* is *A*'s tenant. If however *A* conveys his remainder to *C*, in this case *B* does not stand in the relation of tenant to *C* unless he agrees or consents to become his tenant; and this consent is called an attornment."

In *Words and Phrases*, Permanent Edition, Volume IV, page 798, "Attornment" is defined as follows :

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1. (1828) 8 B. & C. 471 at page 476.

" Attornment is the act of recognising a new landlord. An attornment is a continuation of an existing lease on the same conditions in all respects, putting another in the place of the original landlord. Any act done by a tenant whereby he recognises a change of the person to whom rent is due is an attornment, and an agreement to pay rent to an assignee of the lease is such an act."

In *Corpus Juris Secundum*, Volume 51, page 527, it is observed :

" An attornment in effect is a continuation of an existing lease, and the tenant holds on the same conditions as under the former landlord ; the tenant's possession is that of the new owner....... An attornment is not the creation or intiation of a new lease, beginning on the day of attornment, since a new tenancy arises only on departure from the time and conditions in the original lease."

Whatever shows the assent of the tenant to the alienation of the reversion and his recognition of the alienee as landlord is a valid attornment. A promise to pay rent to the alienee and a tenant's continued occupancy under the tenancy with notice of alienation amounts to a recognition of the purchaser as his landlord. There is no difficulty in this case to hold that there has been a valid attornment by the tenant to the purchasers. But having regard to the legal concept of attorument as elucidated by the references cited above, it does not create by itself a new tenancy between the parties to the attornment but continues the existing lease with the substitution of a new landlord in the place of the old landlord.

Indeed Mr. Rajah Iyer, appearing for the first respondent, did not contend that a mere attornment by itself can have the legal effect of bringing in a new lease between the parties. He submitted that the act of attornment by the tenant in response to the purchaser's request for such an attornment coupled with the subsequent conduct of the purchasers, namely, filing a fresh application for eviction and filing a suit for the recovery of arrears of rent will lead to the inference of a new contract between the parties. I shall consider the effect of the subsequent conduct of the purchasers a little later. But I am definitely of opinion that the attornment of the tenant to the purchasers will not be sufficient to enable the Court to draw an inference of a new contract of lease between the purchasers and the tenant subsequent to the date of purchase *de hors* the lease from Halima Bi under which the tenant was admittedly holding prior to the purchase.

What constitutes a fresh contract of lease between the parties is certainly a question of fact which the Court has got to determine on the facts and circumstances of each case. There is a long catena of cases dealing with a situation where the tenant whose tenancy was determined by notice to quit pays the rent to the landlord and the landlord receives it under protest or without prejudice to his rights. In those cases it was urged on behalf of the tenant that the receipt of the amount by the landlord brought about a new lease or contract of tenancy having the effect of waiver of the notice to quit which determined the tenancy.

In *Hartell* v. *Blackler*[1], the headnote is as follows :

" A tenant whose tenancy had been determined by notice to quit wrote to his lessor enclosing money as and for rent accrued due since the expiry of the notice. The lessor sent on the letter and enclosure to her solicitors who replied ' our client ' does not recognise you as her tenant, and we will retain the money for the time on account of use and occupation of her premises but not as rent :

Held, that notwithstanding the terms of that letter, the acceptance and retention of the money operated as a waiver of the notice and a recognition of a continuance of the tenancy ."

In *Davies* v. *Bristow*[2], the above decision was dissented from. In this case it was held as follows :—

" Where a tenant of a house to which the increase of Rent, etc. (War Restrictions) Act apply holds over after the expiry of a notice to quit and pays rent the landlord is not to be taken by accepting it to assent to a renewal of the tenancy on the old terms, for he has no choice but to accept the rent ; he could not sue in trespass for mesne profits, for these acts provide that the tenant notwithstanding the notice to quit shall not be regarded as a trespasser so long as he pays the rent and performs the other conditions of the lease. "

At page 439 it was observed as follows :

" In this view the acceptance of rent by the plaintiff did not affect the position of the parties. Morevoer if the defendant was resisting the plaintiff's demand for possession in reliance upon a sta-

1. L.R. (1920) 2 K.B. 161. 2. L.R. (1920) 3 K.B. 428.

tutory tenancy created by the Increase of Rent Acts he was bound to tender the sum which he did as rent, and the plaintiff was entitled to receive it. In accepting rent tendered in circumstances like these a landlord does not prejudice his position or lose the right which he would otherwise have of insisting that the term has come to an end."..

In *Shutter* v. *Hersh*[1], Bankes, L.J. at page 445 observed as follows :—

"The tenant was in occupation of rooms to which the Rent Restriction Act applied. The land lord therefore could not turn him out, even if he gave him a lawful notice to quit, except in accordance with the provisions of the Act. What is the position, therefore, of the landlord ? He has no ground for turning the tenant out under the Act, but the circumstances are such that he is entitled under the Act to an increase of rent and therefore he is entitled, if he can, to secure that increase of rent from his tenant. But the statute says that a landlord cannot recover any increase of rent from his tenant except in respect of a period during which, but for the Act, he would have been entitled to obtain possession, and therefore, in order to enable him to come within the provisions of that section of the statute, he has to give his tenant a notice to quit, not in any hope or belief that that will enable him to terminate the tenancy, but to enable him to say that but for the Act, he would have been in a position to turn the tenant out, and that therefore he is entitled to demand the additional statutory rent. How anyone can come to the conclusion that landlord so acting is entering into a fresh agreement with a tenant for a continuance of his occupation under a fresh tenancy I fail to see...... I cannot see any materials upon which one can come to the conclusion that a fresh tenancy was created."

At page 450 Scrutton, L.J., observed as follows :

"It follows from what I have said that, in my view, the correct view of the law is taken in *Davies* v. *Bristow*[2] and that so far as the Rent Restriction Acts are concerned, *Hartell* v. *Blackler*[3] can be no longer relied upon as an authority."

In *Clarke* v. *Grant*[4], the Court of Appeal definitely overruled *Hartell* v. *Blackler*[3]. The Head-note in this case runs as follows :—

"Where therefore after a yearly tenancy had been duly determined by notice to quit, the landlord's agent accepted rent from the tenant because he mistakenly believed it to be paid in arrear and so referable to a period before the end of the lease whereas the tenant was purporting to pay it in advance in accordance with the terms of the lease,

Held, that the acceptance of rent did not operate to revoke the notice to quit in the absence of evidence of any intention to create a new tenancy."

At page 106 Lord Goddard, C.J. observed as follows :—

"It is impossible to find that the parties here intended that there should be a new tenancy. The landlord was all the time desiring to have possession of the premises ; that is why he had given his notice to quit. The mere mistake of his agent in accepting as rent which had already accrued, rent which was in fact payable if it was payable at all, in advance, cannot be used to establish that the landlord was agreeing to a new tenancy."

In *Marcroft Wagons Ltd.* v. *Smith*[5], Denning, L.J., observed as follows at page 506;

"In these circumstances, it is no longer proper for the Courts to infer a tenancy at will, or a weekly tenancy, as they would previously have done from the mere acceptance of rent. They should only infer a new tenancy when the facts truly warrant it. The test to be applied in Rent Restriction Acts cases is the same test as that laid down by lord Mansfield in cases of holding over ; "The question therefore is *quo animo* the rent was received and what the real intention of both parties was ?" *Doe* v. *Batten*[6].

In *Murry Bull & Co. Ltd.* v. *Murray*[7], the observations of Denning, L.J., referred to above were followed by Justice McNair. In *Isaac* v. *Hotel De Paris Ltd.*[8], the judgment of the Judicial Committee delivered by Lord Denning referred to with approval *Marcroft Wagons Ltd.* v. *Smith*[5].

The principle laid down by the decisions aforesaid is that a statutory tenant, who enjoys a certain measure of immunity from eviction under statutes like the Rent Restriction Acts, in England, cannot by discharging his obligation to pay rent to the landlord use it as a foundation of a fresh contract of lease between him and the landlord.

In "*Hill and Redman's Landlord and Tenant*" 10th edition the position is summarised thus at page 455 :

"The acceptance of rent by a landlord from a tenant of premises to which the Rent Restriction Acts apply after the expiry of a notice to quit does not in the absence of an agreement to create a new

1. L.R. (1922) 1 K.B. 438.
2. L.R. (1920) 3 K.B. 428.
3. L.R. (1920) 2 K.B. 161.
4. L.R. (1950) 1 K.B. 104.
5. L.R. (1951) 2 K.B. 496.
6. 1 Cowp. 243.
7. L.R. (1953) 1 Q.B. 211.
8. (1960) 1 A.E.R. 348.

tenancy, operate as a waiver of the notice, for under these Acts such a tenant after the expiry of the notice becomes a statutory tenant and bound to tender the rent which the landlord is by the Acts entitled to accept without losing his right to assert that the tenancy has been properly determined."

The same principle was laid down by the Federal Court in the decision in *Kai Khushroo* v. *Bai Jerbai*[1], as can be noted from the following observations of Justice Mukerjee :

"It may be pointed out that in cases of tenancies relating to dwelling houses to which the Rent Restriction Acts apply, the tenant may enjoy a statutory immunity from eviction even after the lease has expired. The landlord cannot eject him except on specified grounds mentioned in the Acts themselves. In such circumstances, acceptance of rent by the landlord from a statutory tenant, whose lease has already expired, could not be regarded as evidence of a new agreement of tenancy and it would not be open to such a tenant to urge by way of defence in a suit for ejectment brought against him, under the provisions of Rent Restriction Act, that by acceptance of rent a fresh tenancy was created which had to be determined by a fresh notice to quit."

In *Kuppuswami* v. *Mahadeva*[2], a landlord filed an application under the Rent Control Act for eviction of his tenant as he did not pay rent for two months and obtained an order for eviction. But no action could be taken by him in execution of that order becuse the tenant immediately filed an appeal and obtained a stay order. Later, on an application filed by the tenant, the Rent Controller fixed a fair rent for the suit premises, the order being passed " without prejudice to the order of eviction and the order that might be passed in the appeal ". In pursuance of that order, the tenant sent two cheques to the landlord for the amounts due to him under the Rent Controller's orders. The landlord accepted those cheques without prejudice to his rights. It was held that by the landlord's acceptance of the two cheques the tenant did not acquire any fresh rights to continue in possession of the suit premises.

It is clear therefore that none of the circumstances relied upon by the tenant, namely, the attornment, the application for eviction filed by the purchasers, and the institution of the suit for recovery of arrears of rent, can individually or collectively constitute a fresh tenancy agreement between the purchasers and the tenant after the purchase. The tenant is a statutory tenant who is in any event bound to pay the rent due for the premises. Even if the tenant had paid the rent to the purchasers and the rent had been accepted by them, it will not be possible to infer from such payment and acceptance a new contract of tenancy between the purchasers and the tenant. The mere institution of a suit for recovery of arrears of rent cannot be a stronger circumstance in favour of the tenant than payment of rent by him to the purchaser. Further, on the facts of the instant case the averments in paragraph 6 of the plaint in O.S. No. 815 of 1959, City Civil Court, Madras, unmistakably show that the purchasers were instituting the suit without prejudice to their rights to enforce the order of eviction already obtained before the House Rent Controller. The question is one of *animus* and the real intention of the parties. Can it be said that the purchasers abandoned and waived their rights to enforce the eviction order by entering into a new contract, express or implied? There cannot be a valid contract without *consensus ad idem* of the terms of the contract between the parties. The purchasers were very clear in their minds that they should get possession from the tenant. They took every step only to achieve that purpose. The circumstances in the case militate against there being a fresh contract of lease between the parties superseding the rights and obligations stemming out of the eviction order. I am unable to hold that on the materials placed before me there was a fresh contract of lease or tenancy between the purchasers and the tenant.

Mr. Rajah Iyer, learned counsel for the first respondent, contended that the purchasers had one of two remedies against the tenant, either to pursue and enforce the order of eviction or to accept the tenant as being entitled to remainn in possession despite the order for eviction, and having elected to suffer the tenant to

1. (1949) F.L.J. 168: (1949) F.C.R. 262: I.L.R. (1949) Bom. 660 : A.I.R. 1949 F.C. 124 (F.C).

2. (1950) 1 M.L.J. 72 : I.L.R. (1950) Mad 844.

remain in possession by reason of the attornment they were thereafter precluded and estopped from falling back upon the order of eviction first obtained. He also contended that the application for eviction filed by the purchasers unequivocally pointed out the election made by the purchasers in choosing to stand by the new contract of lease said to have come into existence by reason of the attornment.

In this connection learned Counsel for the first respondent strongly relied upon the decision in *R. S. Vijayam* v. *Srinivasan*[1]. That case arose out of proceedings in a redemption suit, O.S. No. 30 of 1945, District Munsif Court, Kumbakonam. There was a usufructuary mortgage by two persons, the plaintiff and the second defendant in the suit, in favour of the first defendant. It ended in a preliminary decree on 30th April, 1947. The plaintiff and the second defendant the two mortgagors paid the amount due under the redemption decree into Court and the first defendant, the mortgagee, drew the money out from Court deposit on 22nd September, 1948. The third defendant in the suit was the tenant in possession let in by the first defendant. The first defendant gave notice........to the third defendant after 22nd September, 1948, to attorn to the plaintiff and the second defendant. The second defendant thereafter filed before the Rent Controller, Kumbakonam, R.C.A. No. 132 of 1950, an application for eviction against the third defendant, but the said application was dismissed on some technical grounds. The second defendant, the co-mortgagor, filed an application against the first defendant I.A. No. 781 of 1950 before the District Munsiff's Court, Kumbakonam, for possession and mesne profits. The question for consideration was whether the first defendant was liable for mesne profits. At page 303 the learned Judge dealing with those facts observed as follows :

"..........I am prepared to hold that the initiation of the proceedings before the Rent Controller by the appellant against the third defendant constitutes an election on his part to treat the tenant in possession as his tenant. When notices were issued by the first defendant to the appellant and the third defendant there were two courses open to the former. The first was to require the first defendant to deliver him *khas* possession of the property refusing to recognise the third defendant ....In the present case the mortgagor has treated the tenant as holding under him and sought relief on that footing in the eviction proceedings. Could he thereafter turn round and assert that the third defendant was not his tenant and claim to treat the first defendant as continuing in possession and therefore liable to pay him mesne profits by reason of wrongful occupation. I am clearly of the opinion that he cannot and that he is precluded by his election in so doing. . . . . There is here a clear case of election and second defendant must be taken by reason of his conduct to have accepted the third defendant as his tenant with the necessary result that he could no longer look to the first defendant for the payment to him of any mesne profits which he now finds unable to recover from the person whom he accepted as his tenant."

At page 304 the learned Judge further observed :

"Where a man is entitled to one of two inconsistent rights and he has with full knowledge done an unequivocal act indicating his choice of the one he cannot afterwards pursue the other which, after the first choice is by reason of the inconsistency no longer open to him. Such cases do not require detriment to the other party as foundation for their application ".

While I agree with respect with the observations of the learned Judge I am unable to hold that that principle has any application to the facts of the present case. There is no question of any election between one of two inconsistent remedies herein. The purchasers had a remedy by way of eviction against the tenant and they always pursued it and did nothing inconsistent with such a right. The application for eviction filed by the purchasers cannot amount to a waiver of their pre-existing right to enforce the eviction order, dated 25th April, 1957. There is no scope for applying the doctrine of election herein. I am of the opinion that the tenant has no valid defence to the order for eviction being enforced against him.

The learned Advocate-General, appearing for the purchasers, the petitioners herein, contended that even if the Court were to hold that there was a fresh tenancy or lease between the purchasers and the tenant that would not afford any ground for the tenant to resist the enforcement of the order for eviction which had reached the stage of indefeasible finality by reason of the provisions of the Madras Buildings (Lease and Rent Control) Act, 1949. Mr. Rajah Iyer, for the first reapondent, submitted contra and contended that if the Court were to find a fresh lease between

1. (1956) 1 M.L.J. 276: A.I.R. 1956 Mad. 301.

the parties that would amount to discharge and satisfaction of the order of eviction and would therefore operate as a bar to the enforceability and execution of that order. It is however unnecessary for me to deal with this contention, as that will arise only if I were to hold that on the materials placed before me an inference of fresh lease was possible. I am therefore expressing no opinion on this contention raised by the learned Advocate-General.

The order of the learned City Civil Judge is erroneous in law and has therefore to be set aside. The Civil Revision Petition is allowed, and the order of the learned City Civil Judge, dated 2nd May, 1959, is hereby set aside. E.P. No. 305 of 1959 and E.A. Nos. 258 and 311 of 1959 are restored to the file of the City Civil Court, Madras, to be disposed of afresh in accordance with law, in the light of the observations contained in this judgment. There will be no order as to costs in this Revision Petition.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

Md. Ayoob .. *Petitioner**

v.

V. Krishna Iyer and Sons .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 4—Scope—Retrospective operation—Application for fixation of fair rent under old Act—Decision of Controller confirmed in appeal—Revision to High Court—New Act coming into force—Procedure—High Court—If bound to set aside orders of Courts below and to remand application for disposal according to new Act.

When, after a revision application is filed against the order of the appellate Court in a proceeding for fixation of fair rent instituted under the old Act (XXV of 1949 as amended by Act VIII of 1951), the New Act XVIII of 1960 came into force, it would not be proper for the High Court to set aside the orders of the Courts below and remand the petition for refixation of fair rent in accordance with the provisions of section 4 of the new Act, on the basis of the deeming provisions of section 35 of the New Act. To do so would be giving to section 4 a retrospective operation which the Legislature did not intend to confer.

As section 35 (3) gives a right to the landlord and the tenant to move the Rent Controller afresh for a fixation of fair rent, and such right would not be affected by the decision in the revision petition, the revision petition can only be disposed of according to the provisions of the old Act as it existed on the date of the original petition.

Petition under section 12-B of the Madras Act XXV of 1949 read with Act VIII of 1951 praying the High Court to revise the Order of the Court of Small Causes (II Judge), Madras, dated 20th August, 1959 and made in H.R.A. No. 23 of 1958 (H.R.C. No. 3115 of 1956 on the file of the Additional Rent Controller, Madras).

S. V. Kumaraswamy, for Petitioner.

S. R. Subramanian, for Respondent.

The Court delivered the following

JUDGMENT.—This petition arises fom the order made in an application under section 4 of the Madras Buildings (Lease and Rent Control) Act. The petitioner was the landlord. He applied for the fixation of a fair rent. The House Rent Controller fixed the rent at Rs. 105 per month. In appeal the Court of Small Causes confirmed this order. In this revision the order of the lower appellate Court is attacked as incorrect and that the fair rent fixed is not adequate having regard to th circumstances of the case.

Since the filing of this revision petition the Madras Buildings (Lease and Rent Control) Act has been replaced by Madras Act XVIII of 1960 amplifying, generally speaking, the several provisions of the Act. In so far as the fixation of fair rent is concerned, new principles have been laid down in this later Act on the basis of which

* C.R.P. No. 22 of 1960.

27th January, 1961.
(7th Magha, 1882—Saka).

such fair rent has to be determined. Learned counsel for the petitioner observes that in the light of section 35 of the Act it would be proper for this Court to set aside the orders of the Courts below and remand the fair rent application for a fresh determination of the question, particularly in view of the enlarged content of section 4 of the Act as it now stands. Examining the scheme of section 35, it is seen that under sub-section (2) (*a*) proceedings taken shall be deemed to be taken under the corresponding provisions of the new Act. Under sub-section (2) (*b*) any application made under the old Act shall be deemed to have been made under the corresponding provisions of the new Act. Under sub-section (2) (*a*) decisions made are also deemed to have been made under the corresponding provisions of the new Act. Relying upon these provisions the learned counsel for the petitioner argues that in disposing of this revision petition, it would be open to this Court to examine the question in the light of the relevant provisions of the new Act, particularly section 4. It seems to me that such a view cannot be sustained. Quite obviously where a new Act replaces an old Act, all pending proceedings suffered to the extent that they might have been disposed of in accordance with the provisions of the old Act. It is not in every case that all such proceedings when they came up before the higher Courts are liable to be set aside or remanded for fresh disposal in the light of the provisions of the new Act. In particular with regard to section 4 of the Act, both the old and new, which deals with the fixation of fair rent, the repeal section 35 contains a special provision. Under section 35, sub-section (3) the tenant or the landlord has been given the right to move the Rent Controller, afresh for a fixation of the fair rent of the building in accordance with the provisions of section 4 as amended, notwithstanding anything contained in sub-section (2) of section 35 or in section 5 of the Act. That is to say, the mere fact that a fair rent has been fixed for a building and such decision is in terms of section 35, sub-section (2), deemed to be a decision under the new Act does not prevent either party to move the Controller once again for fixing the fair rent in accordance with the principles laid down in section 4 of the new Act. Clearly therefore such a right having been conferred upon the parties, it would not be proper for this Court to set aside the orders of the Courts below and remand the petition for refixation of the fair rent in accordance with the provisions under new section 4.

To hold otherwise would also lead to practical difficulties. On the fixation of a fair rent, the right to recover rent at the rate fixed would enure as from the date of the application or at least from the date of the order. If the original petition itself is to be disposed of in the light of section 4 as amended by the new Act, it would mean that the petitioner would have the benefit of the new provision even from a date prior to the enactment; that is, the provision would be given a retrospective operation which the Legislature did not intend to confer.

In the result the petition is dismissed. The right of the petitioner to all the remedies under the new provision as it exists will, in the light of sub-section (3) to section 35, remain unaffected. There will be no order as ot costs.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KAILASAM.

Karuppanna Goundar and others .. *Petitioners**

v.

Sadaya Kudumban *alias* Karuppa Kudumban .. *Respondent.*

Madras Cultivating Tenants' Protection Act (*XXV of* 1955), *section* 3 (3) (a) (ii)—*Deposit under—If could be dispensed with.*

Under section 3 (3) (*a*) (ii) of the Madras Cultivating Tenants' Protection Act, 1955, the rent due by a tenant must be deposited within a month after the date on which it accrued, before an

* C.R.P. No. 2067 of 1959. 2nd February, 1961. (13th Magha, 1882, Saka).

application under section 3 (3) (a) of the Act could be entertained. Even if the tenant pleads that he has sent the rent by Money-Order earlier and it was refused by the landlord his duty to deposit under sub-clause (ii) remains and no discretion is given to the Revenue Court to entertain an application without the deposit being made.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Assistant Collector, Dindigul, dated 14th September, 1959 and made in C.T.P.A. No. 71 of 1958.

A. Venkatesan, V. Vedantachari and *T. Rangaswami Ayyangar*, for Petitioners.

V. C. Veeraraghavan, for Respondent.

The Court made the following

ORDER.—This Revision Petition can be disposed of on the short ground that the deposit was not made within the time specified in section 3 (3) (a) (ii) of the Madras Cultivating Tenants' Protection Act (XXV of 1955).

The tenant filed C.T.P.A. No. 71 of 1958 under section 3 (3) (a) of the Act depositing Rs. 350 towards the rent for the period 25th August, 1957 to 25th August, 1958. The petitioner deposited the amount in Court on 6th November, 1958. The rent was due, according to the lease agreement, on 25th August, 1958 and under section 3 (3) (a) (ii) the amount ought to have been deposited before 25th September, 1958. The tenant pleaded that he sent a money order even on 6th August, 1958, which the landlord refused. Even if this allegation is true no discretion is given to the lower Court for entertaining an application under section 3 (3) (a) if the deposit is not made within a month after the date on which the rent accrued due. In this case admittedly the deposit was not made within that time. In the circumstances the lower Court had no jurisdiction to entertain this petition. This petition is therefore allowed. No order as to costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

R. M. P. Perianna Pillai & Co., Rasipuram .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 13, Proviso—Rejection of assessee's books of account—Conditions necessary for.

What the Proviso to section 13 of the Income-tax Act requires is that the system of accounting adopted by the assessee should be defective, before the department could reject the books of account of an assessee. On the only ground that the gross profits as disclosed by the accounts of an assessee is low, in comparison with others in similar trade, the system of accounting adopted by an assessee cannot be rejected.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (2) of the Indian Income-tax Act, 1922 (XI of 1922) in R.A. Nos. 528 and 529 of 1954-55 on its file for decision on the following questions of law, *viz.* :

"Whether on the facts and in the circumstances of the case, the rejection of the books of accounts and the application of the Proviso to section 13 of the Income-tax Act were justified ?"

K. Srinivasan and *D. S. Meenakshisundaram*, for Applicant.

S. Ranganathan, for *C. S. Rama Rao Sahib*, Special Counsel for Income-tax for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The assessee was a dealer in handloom products which included sarees, shirtings, towels, and bed-sheets. In the years of account

* R. C. No. 132 of 1956.

3rd January, 1961.
(13th Pausa, 1882, Saka).

corresponding to the assessment years 1951-52 and 1952-53, the assessee's books disclosed respectively a turnover of Rs. 3,33,000 and Rs. 4,59,000. The gross profits disclosed by his account-books were 6.3 per cent. and 3.6 per cent. respectively for the two years. The Tribunal agreed with the view taken by the Income-tax Officer and confirmed by the Appellate Assistant Commissioner that the gross profits of the assessee compared unfavourably with those of other dealers. The book results were rejected, and on the application of the Proviso to section 13 of the Income-tax Act, the imcome for each of the years was estimated by making additions to the disclosed profits. The Tribunal limited the addition to Rs. 5,000 for 1951-52; for 1952-53 the Tribunal confirmed the addition of Rs. 10,000 made by the Income-tax Officer.

The directions of this Court under section 66 (2) of the Act led to the reference of the following question :

"Whether on the facts and in the circumstances of the case, the rejection of the books of account and the application of the Proviso to section 13 of the Income-tax Act were justified ?"

In both the assessment years the Income-tax Officer declined to accept the assessee's figures of purchases, supported by the bought notes that he produced, on the ground that there were no independent vouchers. Neither the Assistant Commissioner nor the Tribunal could have considered this as one of the defects in the system of accounts maintained by the assessee. When a similar question arose with reference to the 1949-50 assessment of the same assessee, the Tribunal pointed out :

"When the bought notes as a rule show the names of the suppliers, variety of cloth, cloth price and suppliers' thumb impressions or signatures, it is not possible to brush them aside without making the slightest enquiry as the Income-tax Officer has done."

The attention of the Tribunal was drawn to this earlier judgment in the memoranda of appeals which related to the assessments for 1951-52 and 1952-53.

The Income-tax Officer noticed certain corrections and inaccuracies in the accounts, but the Assistant Commissioner was convinced that there was nothing suspicious about these corrections, and the Tribunal apparently shared the view of the Appellate Assistant Commissioner.

Paragraphs 3 and 4 of the Order of the Tribunal which contained the contentions considered by the Tribunal and its findings thereon ran :

"3. On appeal before us, it was contended that there was no warrant for the application of the Proviso to section 13. It was contended that goods of one variety only were manufactured and that there was no need to keep a variety-wise stock tally showing the stock particulars. We find that this is not borne out by the records. It is clear therefrom that the assessee had dealt in a large variety of goods. In the absence of a variety-wise stock tally for all these goods, there is no doubt that the Proviso to section 13 applies.

"4. So far as the second year is concerrned, no attempt has been made before us to show that all the purchases had been properly vouched. We had a look at the comparable cases for the two years in question and are left with the feeling that the percentage of 5.8 applied in respect of the year 1952-53 is well below the average applied in all the other cases. Therefore, we see no reason to interfere with the addition made in respect of that year."

The principal point made was there was no variety-wise stock tally. Annexure B contained quantitative stock particulars for 1951-52 and the assessee gave similar particulars for 1952-53 in Annexure A. Annexure B was filed only before the Appellate Assistant Commissioner, but in the next year the assessee filed the statement (Annexure A) even at the stage of assessment by the Income-tax Officer. In both the statements particulars were furnished for goods of the different counts of yarn, 40, 60 and 80, and there was another heading styled "miscellaneous". These statements were prepared from the account-books of the assessee. Though it was pointed out that the statement of the first year was not signed by the Chartered Accountant employed by the assessee, the correctness of the Statement of neither year was found against. We have also pointed out that neither the Appellate Assistant Commissioner nor the Tribunal found any entry in the account-books,

either sale or purchase, was untrue. There was no finding, for example, that the purchases were inflated or the sales were suppressed. Though in paragraph 4 of the order of the Tribunal there was a remark that all the purchases had not been properly vouched for, we have already pointed out that that apparently was not the real basis for rejecting the accounts. The Tribunal obviously realised the impossibility of independent sale vouchers to support the bought notes. There was therefore nothing to show that the accounts of the assessee were not correct.

It is true that the gross profits disclosed by the assessee's accounts were low. That by itself was not enough to reject the system of accounts maintained by the assessee. Low gross profits should certainly put the Department on enquiry to verify if the entries in the account-books were spurious, or to verify if the system of accounts itself was defective, which made it impossible to accept the book results as disclosing the true profits of the assessee. In other words, on the only ground that the gross profits were low and compared unfavourably with those of others, the system of accounting adopted by an assessee cannot be rejected. What the Proviso to section 13 requires is that the system of accounting adopted by the assessee is defective. We may point out that even for these two years it was not the same rate of gross profits that resulted even after the additions made by the Tribunal. The real basis for sustainting the additions was what was set out in paragraph 4, an extract from which we shall set out again in this context :

" We had a look at the comparable cases for the two years in question and are left with the feeling that the percentage of 5.8 applied in respect of the year 1952-53 is well below the average applied in all the other cases."

With reference to the first year, as pointed out in paragraph 5 of the judgment, the addition was limited to Rs. 5,000 because the profits made by others or adopted by the Department,

" are slightly less than 8.3 per cent. applied in the assessee's case."

No doubt, in paragraph 3 the Tribunal recorded :

" In the absence of a variety-wise stock tally for all goods, there is no doubt that the Proviso to section 13 applied."

What precisely the Tribunal required, we are really unable to gather either from its judgment or even from the statement of the case. Annexures A and B prepared by the assessee and placed before the Tribunal did contain particulars of stock tally and a variety-wise stock tally under each variety of yarn. Whether in addition to these statements the Tribunal wanted statements of particulars according to each variety of handloom product and or under each range of prices, irrespective of the classes of goods within that range, is not clear. The Tribunal apparently never called upon the assessee to furnish such particulars. Nor apparently did the Tribunal investigate whether such particulars could be gathered from the accounts maintained by the assessee. It is true the assessee did not maintain all through the year a separate variety-wise stock account either on the basis of counts of yarn, or prices or classes of goods. The absence of such stock books did not prevent the acceptance of the book results in the previous assessment years. We have also to point out that no attempt was made by the Tribunal even with reference to the assessments with which we are now concerned, to verify if the particulars given in the accounts or in the statements, Annexures A and B, were inaccurate. The absence of a stock-book or a series of stock-books does not appear to have been the real basis of rejecting the book results. Annexures A and B were not rejected. They did furnish variety-wise stock particulars. As we understand the judgment, the real ground on which the book results were rejected was that the gross profits were low. That, as we said, is not enough to condemn the system of accounts that the assessee consistently adopted. It was not even enough without further investigation to reject the accounts themselves in either of the years.

Though the statement of the case is more elaborate than the judgment of the Tribunal, the position still remains the same, the real ground for applying the Pro-

visio to section 13 was that the gross profits disclosed by the book results appeared low and compared unfavourably with those of others in the same line of business. That we must emphasise was not enough to reject the books of account.

We answer the question in the negative and in favour of the assessee. The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

R.M. ——— *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

S. M. Narayanan and another .. *Appellants**

v.

S. R. Narayana Iyer .. *Respondent.*

Tort—Defamation—Article in monthly journal—Libellous attack on person characterising him as a Godseite and as a member of that group—Effect of—Absence of any occasion for the writing and absence of inquiry as to facts relied on for attack—Personal animus*—If to be proved—Motive —Relevancy—Malice in law—Sufficiency—Quantum of damages—Factors to be considered—Principles.*

The defendants were the editor and propreitor-printer of a Tamil montly journal, largely devoted to the interests of plantation labour and published at Coonoor in the Nilgris. The plaintiff, *N.*, a practising lawyer of Coonoor of some seniority was a citizen of Coonoor and a member of the Hindu Mahasabha who believed in a militant Hindu State.

An article published in an issue of the above montly journal, dated 15th January, 1955, attacked the plaintiff, *N.*, in respect of an alleged statement made by him about Pandit Nehru to the effect that Pandit Nehru was "Jaffer Nehru", because of his Muslim pre-dispositions; the article then proceeded to arraign the plaintiff as a member of the Godse group or as Godseite. The writer stated that there were still several persons of this group who distributed sweets on hearing the news of the assassination of Mahatma Gandhi and were happy ; that persons should be very vigilant because there were still may Godses and *N's* among the public, that a careful watch might have to be kept on persons of this description as there was every likelihood of danger or menace from them and that it would be in the public interests if the officers of the criminal investigation department watched the movements of such persons with vigilance and sincerity. The article was headed "we feel ashamed and vexed. There are still a crowil of Godses."

It appeared that the plaintiff had not referred to Pandit Nehru as "Jaffer Nehru," but had only stated in a rejoinder to a letter to a journal, that "if Mr. Nehru became a Jaffer Nehru", *viz.*, by becoming a Muslim, he would forfeit his deposit in the next election. But the defendants had not properly read and understood the letters nor made any reference to the plaintiff to ascertain the facts.

There was no evidence to show that the plaintiff believed in political assassination as a method of achieving his objects. On the contrary in a book written by him long before the article in question, the plaintiff had characterised Godse as a "despicable creature" and the assassination of Mahatma Gandhi itself as a "trecherous crime" which had brought everlasting disgrace to Hinduism itself. At one stage the plaintiff offered the defendants the opportunity of an apology but the draft apology which the defendants were called upon to sign was couched in such abject terms that no editor could have really signed it compatible with his professional self-respect.

Held :—(1) To brand any person as a Godseite or a member of that group from whom danger may be apprehended was to impute that the person was likely to adopt the methods of political assassination for enforcing his opinions and there could be no doubt that the expressions complained of were highly defamatory *per se* ;

(2) that there was hardly any occasion for the offending article which was highly defamatory *per se* and hence no personal *animus* need be shown ; the defendants were not therefore entitled to claim privilege of occasion ;

(3) that the act of blackening the plaintiff in the eyes of the reading public of the periodical was not justified either as fair comment or as truth ;

(4) the question of motive was not material, and it was sufficient that malice in law was fully proved ;

(5) that the imputation against the plaintiff was cruel and unjust, and since the occasion was not privileged, the libel was established ;

(6) that while the fact of an offer to apologise having been offered was certainly a relevant fact in assessing the damages, there was no real or fair opportunity for an honourable apology ;

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* Appeal No. 173 of 1957. 27th October, 1960. (5th Kartika, 1882, Saka).

(7) that the plaintiff had not established that he suffered any actual or substantial injury to his reputation ;

(8) that Courts of law are not bound to sustain in full actions for damage for libel which are primarily intended for the monetary benefit of the plaintiffs taking advantage of the occasion of a libel ; and

(9) that therefore the case was only one for nominal damages and not for the award of substantial damages.

Appeal against the Decree of the Court of the Subordinate Judge of Nilgiris, Ootacamund, in Original Suit No. 20 of 1955.

K. V. Sankaran, for Appellants.

T. S. Swaminathan for *K. V. Ramaseshan*, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the defendants in the Court below who are the editor and the proprietor-printer respectively of a monthly Tamil Jounral published at Coonoor. They were sued by the Plaintiff (S. R. Narayana Ayyar) for damages to the tune of Rs. 5,500 in respect of a defamatory statement or libel made against the plaintiff by the first defendant (the editor) in the issue of the periodical, largely devoted to the interests of plantation labour, dated 15th January, 1955. The learned Subordinate Judge of the Nilgiris tried the action upon the merits, and came to the conclusion that the imputations were *per se* defamatory, that they were not entitled to protection as within the bounds of fair comment, nor of privilege, and that the plaintiff was hence entitled to damages. Damages to the tune of Rs. 1,000 were awarded against both defendants with costs. The appeal is from these findings.

The Tamil text of the article containing the libel is re-produced in paragraph 6 of the judgment of the lower Court. A true translation thereof (Exhibit A-2) is also to be found at page 63 of the printed papers. Since there is very little doubt or difficulty about the language employed, or its broad interpretation, I do not think that it is necessary for me to proceed into the niceties of expression in Tamil. Briefly stated, the article attaks the plaintiff, Sri S. R. Narayana Ayyar, in respect of an alleged statement made by him about Pandit Nehru, to the effect that Pandit Nehru was 'Jaffar Nehru' because of his Muslim pre-dispositions. The article then proceeds to arraign the plaintiff as a member of the Godse group or as a Godse-ite. The writer states that there are still several persons of this group, who distributed sweets on hearing the news of the assassination of Mahatma Gandhi, and were happy. Persons should be very vigilant, because there may be still many Godses and Narayana Ayyars amongst the public. A careful watch might have to be kept on persons of this description, as there is every likelihood of danger or menace from them. Further, according to the writer, it would be in the public interests, if the Officers of the Criminal Investigation Department watched the movements of such persons with vigilance and sincerity.

There is no dispute, as I have earlier remarked, about the purport and tenor of the passage in question. Since Nathuram Godse was practically unknown as a politician or a public figure, except perhaps within the confines of Maharashtra, till he sprang into prominence upon the occasion of the assassination of Mahatma Gandhi, and acquired immediately a country-wide notoriety, I do not think that it can be seriously challenged either that the name of Godse is inevitably linked in the minds of the public with that tragic crime. In other words, to brand any person as a Godse-ite, or a member of that group from whom danger may be apprehended by the public, is to impute, with very little *innuendo* about it, that that person was likely to adopt the methods of political assassination for enforcing his opinions. The little vagueness that might remain about this interpretation is dispelled by the further statement of the writer that Godses and Narayana Ayyars were still amongst us, and that, in the public interests, the movements of such persons should be carefully watched by the Officers of the Criminal Investigation Department.

There can be no doubt, in consequence, that the expressions complained of were highly defamatory *per se* and further that the effect of the entire passage, upon the mind of any unprejudiced writer, would be to lead him into the belief that the plaintiff (Sri Narayana Ayyar) was a person from whom violence against esteemed public leaders might be feared. This is not a mere fragmentary interpretation, founded upon one or two isolated sentences torn from the context. It is the general effect of this article headed : " We feel ashamed and vexed. There is still a crowd of Godses ". Not merely this, but it is an impression reinforced by the explicit expressions used. The further questions that arise for our consideration, may be formulated as follows : Firstly, was the occasion a privileged one ? Secondly, if the occasion were to be held privileged, has actual malice been established against the writer of the article ? Thirdly, do the expressions exceed the bounds of fair comment, when we bear in mind the antecedents and general opinions of the plaintiff (S. R. Narayana Ayyar), which seem to be very well-known in his locality ? Finally, there is the question of the quantum of the damages, and the basis upon which damages should be ascertained.

In Halsbury's ' Laws of England ' Simonds Edition, Volume 24, page 8, in sub-section (3) of the section " Liberal and slander " it is observed that if the occasion was a privileged one, express or actual malice might have to be proved. The precise form in which this is put is :

> " If the occasion is such that there was either a duty or right to make the publication, it is said that the occasion rebuts the presumption of malice, but the malice (which here means malice in fact, or, as it is technically called, express or actual malice) may be 'proved.' "

In the present case, it is not seriously contended that there was a personal motive on the part of the writer to defame Mr. Narayana Ayyar. Hence, the question is of some importance in applying the legal principles to the facts, whether the occasion was privileged, and whether the plaintiff should therefore have made out express or actual malice, apart from malice in law, which must necessarily accompany such defamatory statements *per se.*

Here, learned counsel for the appellants (Mr. Sankaran) has very fairly conceded that the facts are such that a privilege of occasion could hardly be claimed. Two of the documents exhibited in this case, *viz.*, Exhibits A-13 and A-14, sufficiently illuminate the occasion for the writing of the article in the periodical. One Mr. Shammanna wrote a letter to the editor of the *Blitz News Magazine* in which he alleged that Mr. Narayana Ayyar had referred to Prime Minister Nehru as ' Jaffar Nehru ', and the correspondent expressed surprise that such remarks were allowed. Mr. Narayana Ayyar rejoined with an explanatory letter (Exhibit A-14) in which he denies the allegation, and claims that all that he asserted was that if Mr. Nehru became a ' Jaffar Nehru ', *viz.*, by becoming a Muslim, he would forfeit his deposit in the next elections. The writer (First defendant) does not appear to have properly read and understood these two letters, and, admittedly, he made no reference to Mr. Narayana Ayyar, which he could have easily done, because he was living in the same place, in order to ascertain the facts. Upon the mere averment or opinion of Mr. Shammanna, and without further verification, the first defendant launched into the offending article in question, when there was hardly any occasion for this particular attack. It is for this reason that I must affirm that the question of privilege does not arise, except in a very qualified form. It is true that the facts do not establish a personal *animus* for the writer to move against Mr. Narayana Ayyar. But where the words employed, and the general purport of the article, are highly defamatory *per se* I do not understand the law to imply that personal animus must necessarily be shown to the satisfaction of the Court. There are two decisions relied on by Mr. Sankaran for the appellants, both of which are of interest. It the first *Silkin* v. *Reaverbrook Newspapers, Ltd.*[1], it is observed that what a person says by way of comment on a matter of public interest, honestly, however exaggerated or prejudiced, is fair comment sustainable as a defence to a libel action. But this very judgment con-

1. (1958) 1 W.L.R. 743.

tains a proviso that the comment cannot be so strong that " no fair-minded person could have made it." In *Grech* v. *Odhams Press, Ltd.*[1], Denovan, J., held that, though the words complained of might be defamatory and untrue, yet nevertheless they were fair comment upon a matter of public interest. I do not think that these decisions really help the appellants in the present case. The views of Mr. Narayana Ayyar were not, in themselves, a matter of public interest at all, since, apart from being a practising lawyer of some seniority and a citizen of Coonoor, his views no more concern the public than those of any other private individual of the Republic. The matter could be said to have merited treatment as one of public interest, only if Mr. Narayanana Ayyar had openly, and in public, made any imputation which was the immediate provocation for the article. But whre the writer launches into an attack, without even verifying the truth of that averment, which itself appeared as a reference in the letter of some other correspondent to the editor of the *Blitz News Magazine*, I do not think that the writer is entitled to claim privilege of occasion. As regards fair comment, I do not think that the words can fall within that scope ; they would certainly have done so, had the writer contented himself with merely castigating Mr. Narayana Ayyar for his opinions. Even had the writer merely stated that Mr. Narayana Ayyar should be repudiated by all right-thinking people, for his extreme views as a member of an extreme section of the Hindu Mahasabha, the words would not have been objectionable. But to proceed further, and to imply that Mr. Narayana Ayyar might also adopt the methods of Godse, and would equally be a proper object for vigilance by the C.I.D. Police, is, in substance, to defame and blacken him in the eyes of the reading public of this periodical. It is not justified as fair comment. It is certainly not justified as truth. We have elaborate testimony on record, to which I shall make reference a little later, about Mr. Narayana Ayyar's antecedents, and his political views. However that may be, there is nothing in the record, which may be said to be excessively cumbered by excerpts from Mr. Narayana Ayyar's writings, to show that Mr. Narayana Ayyar believed in political assassination as a method of achieving his objects. On the contrary, in a book entitled " What shall we do " by " An obscure Hindu ", which Mr. Narayana Ayyar undoubtedly wrote, and which bears an introduction from Dr. C.P.Ramaswamy Aiyar, there is a passage at page 103 referring to Godse, written *ante litem mottam*, long before the present libel, in which the author characterises Godse as " a despicable creature ", and the assassination of Mahatma Gandhi itself as a ' treacherous crime ' which has brought everlasting disgrace to Hinduism itself. Mr. Sankaran contends that Mr. Narayana Ayyar could not, with safety to himself, have said less ; but that it not a generous or fair interpretation. We may hence take it that, in this cose, the libel is clearly made out, and that it is not justified either by a privilege of occasion, or by being within the bounds of fair comment or by its truth. The question of motive must recede into the background. It is sufficient that malice in law has been fully proved.

But having arrived at these findings, it is essential that I should make some reference to the antecedents and the political views of Mr. Narayana Ayyar. I have to do so, for two important reasons. Firstly, that has an intimate relevance to the question of the damages to be properly awarded in the present case. Secondly, the admissions of Mr. Narayana Ayyar in evidence, and his antecedents do provide a clear and rational explanation for this attack against him, which is not an isolated instance. Actually, there have been prior attacks of precisely the same kind, though it is not clear from the record whether Mr. Narayana Ayyar sought and obtained redress on all those occasions. I shall content myself with a very condensed epitome of Mr. Narayana Ayyar's views and antecedents. As I hinted earlier, and as is perhaps unfortunately common in such actions, the record is swollen with passages and excerpts which have little relevance or significance. In brief, Mr. Narayana Ayyar has made no pretence about his political opinions and allegiances, from the very commencement. In his views, and in his background generally, he seems to belong to that climate of opinion which characterises the extreme wing of the Hindu Mahasabha Organisation. He admits the following facts.

1. (1957) 3 All E. R. 556.

According to him, pronouncing the name of Jinnah was a heinous crime. He feels that most of the Muslims in India are spies, who should be banished or compelled to return to Pakistan. Gandhiji committed a big error in working for Hindu Muslim unity. Mr. Nehru was not merely an impracticable patriot, but a leader who has brought disaster after disaster to the unfortunate people of India. In brief, he claims that "Nehru is the evil Genius of India". Every concession to Muslim sentiment or claims, however legitimate, seems to him to be a national disaster. He does not believe in the secular State. He states that his heart trembles in sorrow and anger, when he hears that word. He believed in a militant Hindu State, and also believes that our foreign policy has landed us in a mire. Actually, he was described once as an embryo Godse, and by another writer as a worshipper at the shrine of Godse, without the courage of Godse. Finally he states, that in his view many of our legislators were incapable of earning a living outside the Legislature, and adds "I wish I had the strength of Bhima to thrash these fellows."

I think that even in this condensed form, the opinions and mentality of Mr. Narayana Ayyar are sufficiently evident. They explain the several violent attacks against him. Undoubtedly he is at liberty, in this secular State, where the fundamental freedoms of the individual are guaranteed under the Articles of our Constitution, to profess these views, and even to propagate them. But certainly he would be well advised, in doing so, to employ language which does not wound or injure the susceptibilities of fellow-citizens who might have their own loyalties to certain national leaders. I find that, on one occasion when the dangerous trend of Mr. Narayana Ayyar's opinions and activities was discussed, as between the authorities responsible for law and order in the District, the District Superintendent of Police (Mr. Ronsen) wrote to the District Magistrate to this effect, that Mr. Narayana Ayyar "has got a very loose tongue and is rather impulsive. He is not capable of doing any mischief." It is impossible to resist the inference that, to a considerable extent, Mr. Narayana Ayyar has called down upon himself these successive verbal assaults, mainly because he has not cared to practise either forbearance or restraint and temperance in expression.

Mr. Sankaran would contend that, in view of this background which I have just referred to, the actual expressions did not exceed the bounds of propriety and fair comment. I have carefully considered this argument, and I must agree that there is a certain plausibility and strength lent to it from the very record of the observations and writings of the plaintiff. Nevertheless, I think that it must be overruled because, as I have earlier clearly found, there is absolutely nothing to justify even a superficial impression that Mr. Narayana Ayyar would go so far as to adopt the methods of polictical assassination, or that he favours them. A very similar case, as far as the principles and the broad facts are concened, is *Subhas Chandra* v. *Knight & Sons*[1], and in many respects, that was a far stronger case for the defendant. But even on that occasion Rankin, C.J., held, after an analysis of the facts in which the incidence of the principles is lucidly exposed, if I may say so with great respect, that the libel was actionable. I do not think that it is necessary for me to state anything further on this aspect. Upon the broad merits, the appeal must fail, unless it can be shown that Mr. Narayana Ayyar not merely has sympathy for the opinions or communal affinities of Godse or people like him, but that he actually favours the method of assassination adopted by Godse. That is a cruel and unjust imputation, against Mr. Narayana Ayyar, as for as I can Judge. That being so and since the occasion was not really privileged, the libel is established.

Upon the question of damages, I have carefully considered the arguments urged by respective learned counsel, and I am of the view that the damages actually awarded are highly excessive, and not at all justified by the merits of the situation. At one stage in the proceedings which led to this litigation, Mr. Narayana Ayyar seems to have offered the opposite party the opportunity of an apology. That is certainly a relevant fact, and had the opportunity been fairly offered, I would certainly consider the situation aggravated by the contumacy of the defendants. But I find from

1. A.I.R. 1929 Cal. 69.

an actual perusal of the draft apology which defendants were called upon to sign (Exhibit A-16), that it was couched in such abject terms that no editor could have really signed it, compatible with his professional self-respect. It is true that the pleadings also show a strange attitude, as far as the defendants are concerned. The written statement betrays several defences, which are neither logical, nor convincing, and which seem to have been adopted in a desperate attempt to meet the suit claim. In brief, the defendants appear to desire to make out that they themselves did not condemn Godse, for having the courage of his convictions. But I do not think that it would be fair to tax the defendants too severely with these averments, which merely savour of the strategy of litigation. I do not think that there has been any real aggravation in this sense, nor was there a real opportunity offered for an honourable apology. The further question is whether Mr. Narayana Ayyar should now be awarded nominal damages, or should be awarded substantial damages to the tune of Rs. 1,000 as adopted by the lower Court.

In this context, I must reiterate that Mr. Narayana Ayyar's antecedents, views and previous history, including the freedom and vigour with which he has always expressed those views, largely explain the impression which led to the writing of this article. I must also stress that, since Mr. Narayana Ayyar does not seem to have cared to practise verbal restraint in his own writings, it must be pleaded in mitigation of the offence of the appellants that they were provoked by the terms in which Mr. Narayana Ayyar either referred to, or was supposed to have referred, to Pandit Nehru. Even taking Mr. Narayana Ayyar's own modification of the averment as the truth, *viz.*, that he said that Pandit Nehru would be 'Jaffar Nehru' if he became converted as a Muslim and would forfeit his deposit at the elections it is clear enough that such a contemptuous reference to a greatly esteemed national leader may lacerate the feelings of others. Though learned counsel are unable to elucidate the particular word 'Jaffar', I think that it is a reasonable interpretation that the reference is to Mir Jaffar, who played a dubious role in Indian history by becoming a traitor to his master. Again, I do not think that Mr. Narayana Ayyar has, for a moment, succeeded in establishing that he has suffered any actual or substantial injury to his reputation. I have gone carefully through the evidence of the witnesses cited and examined to prove this fact, *viz.*, P.Ws. 1, 2, 3, 4, 5, 6, and 7, and I find very little beyond this, that most of these persons affirm that they would have felt grossly insulted if anyone had called them a Godse-ite or follower of Godse. Mr. Narayana Ayyar is not a political figure of any significance. The record only shows that he is a lawyer and a private citizen, who has certain limited public activities to his credit, like many other people. The concerned periodical is not likely to be read by the intelligentsia, and it largely circulates among plantation labourers, whose problems it deals with. I think it is impossible to claim, on the record, that substantial injury to the reputation of Mr. Narayana Ayyar has been caused by the offending article. It must further be recollected that the libel does concern the political views of Mr. Narayana Ayyar, and does not *per se* relate to his private life, or to his professional character and reputation as a lawyer.

I think that I have indicated sufficiently my grounds for the view that damages awarded should only be nominal in the present case. As observed in Kameswara Rao's 'Law of Damages and Compensation' 3rd Edition, 1959, page 16:—

> "Nominal damages are intended only where the plaintiff has sustained *injuria damnum*, that is, where the right of his has been infringed, but not so as to cause any sensible damage."

Mr. Swaminathan for the plaintiff-respondent argues that Mr. Narayana Ayyar suffered greatly in mind and health, because of his libel, and that that circumstance ought to be taken into account. He further contends that, where a person like this plaintiff chooses the alternative of claiming substantial damages instead of an apology, the defendants have no option but to pay. He has placed considerable reliance upon the Bench decision of this Court in *Subramania* v. *Hitchock*, [1]. I have gone through this decision, and it appears to me that the facts of that case were

1. A.I.R. 1925 Mad. 950.

very widely different, that the decision cannot be of any real help or value in the present context. Actually, the one relevant passage is from Odgers on ' Libel and Slander ' page 374 (quoted at page 954), to the effect that nominal damages should be awarded only where the plaintiff is content to clear up his character, and does not care to 'put money in his pocket'. Mr. Swaminathan has actually advanced an argument, in all seriousness, which, I confess, I find a little startling, to the effect that there is nothing wrong in the utilisation of such an occasion by the plaintiff in order to seek and obtain the maximum monetary consolation that he could. That may be so, and it may be that there are certain passages in the authorities, lending support to such an interpretation. But I do not think that Courts of law are bound to sustain in full actions for damages for libel which are, primarily, intended for the monetary benefit of the plaintiff, taking advantage of the occasion of libel. On the contrary, I think that, of all the factors relevant to the quantum of damages, the two most important are (1) the kind of justification which the writer might have had, even if the passage is defamatory *per se*, and malice in law is established and (2) the actual injury to reputation which the person defamed has suffered, as proved by the record. I am satisfied that this is a case only for nominal damages, and not for the award of substantial damages.

Accordingly, I allow the appeal only to the extent of reducing the quantum of damages awarded to plaintiff-respondent from Rs. 1, 000 to Rs. 100. As regards the costs the Plaintiff will have actual costs of the Court-fee and advocate fee incurred in the lower Court, according to the record. Parties will otherwise bear their own costs throughout.

P.R.N. ——— *Appeal dismissed on merits, but allowed as to quantum of damages only.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(Appellate Jurisdiction).

MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATADRI.

M.RM.M.M.N. Natarajan Chettiar .. *Appellant**

v.

The Income-tax Officer, III Additional Circle, Karaikudi, Ramnad District and another .. *Respondents.*

Income-tax Act (XI of 1922), section 18-A (6)—Interest on the advance tax-Reopening and re-assessment under section 34 of the Act—Demand under re-assessment including the statutory interest upto the date of reassessment —Levy of interest is illegal.

Section 18-A (6) of the Income-tax Act contains two terminii, one is fixed in the sub-section (6) *i e.* 1st day of January, in the financial year in which the tax was paid, and the other terminus is the date of the regular assessment.

Interest under sub-section (6) is payable only where in any year an assessee has paid tax under sub-section (2) or sub-section (3) on the basis of his own estimate and the tax so paid is less than 80 per cent. of the tax determined on the basis of the regular assessment.

If a regular assessment is made under section 23 of the Act, it is only then that it is ascertained whether the condition *i.e.*, if the amount of tax paid on the estimate of the assessee is less than 80 per cent. of the tax determined on the basis of the regular assessment is satisfied. If it is less than 80 per cent., then only the liability to pay interest under sub-section (6) arises.

Once sub-section (6) has been applied and the amount ascertained on the basis of the regular assessment under section 23 as originally made, there was a finality, subject only to the provision contained in the Second Proviso, which relates to the reduction of the amount on which interest is payable as a result of an appeal, revision, or a reference.

There is no provision to meet the contingency, where the amount of tax payable by the assessee is increased by proceedings taken under section 34 of the Act.

The orders of the Income-tax Officer in so far as they include the payment of statutory interest under sub-section (6) of section 18-A upto the date of the re-assessment orders are liable to be quashed.

Case-law discussed.

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* W.A. Nos. 23 to 28 of 1958.

11th January, 1961.
(21st Pausa, 1882, Saka).

Appeals under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Panchapakesa Ayyar dated 12th November, 1957 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 864 to 869 of 1957 respectively presented under Article 226 of the Constitution of India to issue a writ of *ceritorari* calling for the records of the 1st Respondent relating to his reassessment orders in G. I. Nos. 3077/m/47/48, 3088/m/48-49, 3088/m/50-51, 3088/m/49-50, 3088/m/52-53, 3088/m/51-52, respectively dated 28th February 1957 and the levy of the penal interest of Rs. 1,324 under section 18-A (6) of the Indian Income-tax Act, contained in the said reassessment, and the order of the Inspecting Assistant Commissioner, Madurai Range, the 2nd Respondent herein dated 25th April, 1957 and made in C.R.No. 8 (1) 57-58 respectively.

K. Srinivasan, D. S. Meenakshisundaram and *A. Devanathan,* for Appellant.

S. Ranganathan for *C. S. Rama Rao Sahib,* Special Counsel for Income-tax, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These appeals under the Letters Patent are from the judgment of Panchapakesa Ayyar, J. disposing of Writ Petitions Nos. 864 to 869 of 1957. A common question of law arises in these appeals. The appellant was an assessee on the file of the Income-tax Officer, III Additional Circle, Karaikudi. The assessments on the appellant for the years 1947-48 to 1952-53 were originally completed on different dates, which it is not material to mention, on particular total incomes. These assessments were made under section 23 (3) of the Indian Income-tax Act. Subsequently, the Income-tax Officer re-opened the assessments under section 34 of the Act and recomputed the appellant's total incomes for the different years at figures, which were in excess of the original figures. There is no dispute as regards this re-opening and re-assessment under section 34 of the Act. But in the demands based on the re-assessment dated, 28th February, 1957, the Income-tax Officer included certain sums as interest payable under section 18-A (6) of the Act. The appellant took exception to this charge of interest. At the same time he applied to the Inspecting Assistant Commissioner, Madurai Range to get relief under the Proviso to rule 18-A (6), which runs thus :

> " Provided further that in such cases and under such circumstances as may be prescribed, the Income-tax Officer may reduce or waive the interest payable by the assessee."

Rule 48 is the material rule. This application was, however, rejected. Thereupon the appellant filed the writ petitions out of which these appeals arise for the issue of writs of *certiorari,* or such other appropriate rules or orders to quash the imposition of the penal interest as per the said reassessment orders. The main contention raised on behalf of the appellant in his writ petitions was that section 18-A (6) of the Act will not in terms apply to an assessment made under section 34 of the Act. The learned Judge held against this contention. There was also another contention raised before him that the Assistant Commissioner of Income-tax before whom an application had been filed to reduce or waive the interest levied on the appellant had not properly disposed of the application, because he had not assigned any reasons for declining to exercise his discretion in favour of the appellant. This contention also was rejected by the learned Judge.

Mr. Srinivasan, learned counsel for the assessee before us practically confined his argument to the first contention, though he did not abandon his second contention. His argument was that the expression " regular assessment " in sub-section (6) of section 18-A of the Act will not apply to a re-assessment after re-opening the original assessment under section 34 of the Act. The learned counsel for the department contended that the assessment under section 34 would also fall within the category of regular assessments. Panchapakesa Ayyar, J. disposed of this controversy in a very simple manner. He observed :

> " I fail to see how a ' re-assessment ' will not be a ' regular assessment '. Surely, it is not an irregular assessment."

He compared the re-assessment to an amended decree. To us the matter does not appear to be so simple as it appeared to the learned Judge. We do not read the words ' regular assessment ' to mean and signify only a valid assessment. Evidently the learned Judge thought that ' regular ' meant ' valid ', *i.e.*, not irregular. But with respect to the learned Judge an irregularity does not always result in invalidity. There are several irregularities in procedure, which may not affect the validity of the substantial order. If a regular assessment means and signifies an assessment made in the regular course contemplated by the provisions of the Indian Income-tax Act, then surely an assessment under section 34 is not a regular assessment. There is difference between an assessment not being a regular assessment and an assessment being an irregular assessment.

Neither learned counsel for the assessee, nor learned counsel for the Department has been able to bring to our notice any direct authority on the question, which falls to be decided in these appeals. Mr. Srinivasan relied upon what he called the definition in the statute itself of a regular assessment in sub-section (5) of section 18-A. That sub-section runs thus :

" The Central Government shalll pay simple interest (i) at two per cent per annum on any amount payable in accordance with the provisions of this section befoie the first day of Apiil, 1955, and paid accordingly ; (ii) at four per cent per annum on any amount payable in accordance with the provisions of this section after the 1st day of April, 1955, and paid accordingly ;

from the date of payment to the date of the provisional assessment made under section 23-B or if no such assessment has been made to the date of the assessment (hereinafter called the 'regula assessment ') made under section 23 of the income, profits and gains of the previous year for an assess ment for the year next following the year in which the amount was payable."

The ' regular assessment ' therefore, which occurs in the next sub-section, *i.e.*, sub-section (6) must bear the same meaning namely, ' an assessment made under section 23 of the income,' *etc.*

Learned counsel for the Department met this argument in two ways : (1) By pointing out that the expression ' regular assessment ' in sub-section (5) of section 18-A must be understood in the context as distinct from the provisional assessment made under section 23-B. (2) By contending that re-assessment under section 34 of the Act, or even an assessment for the first time under section 34 of the Act would also be an assessment under section 23 of the Act. He relied upon the ruling of this Court in *C.V. Govindarajulu Iyer* v. *Commissioner of Income-tax*,[1]. That decision, however did not directly deal with this point. That related to the power of the Income-tax Officer to levy a penalty under section 28 (1) (*a*) for failure without reasonable cause to furnish a return pursuant to the general notice under section 22 (1) of the Act in proceedings taken under section 34 of the Act. Observations in the course of the judgment that proceedings under section 34 in that case relate to the same proceedings, which must be deemed to have commenced with the publication of the general notice under section 22 (1) should not be stretched to cover the argument raised by the learned counsel for the Department. Mr. Srinivasan referred us to a decision of the Bombay High Court in *Sarangpur Cotton Manufacturing Co. Ltd.* v. *Commissioner of Income-tax*[2]. That related to the converse case where the Department is under a liability to pay interest under section 18-A (5). It suffices to state the following facts in that case. The assessee paid advance tax under section 18-A and assessment under section 23 was completed on 30th March, 1948. The assessee appealed against the order of assessment. That order was set aside by the Appellate Assistant Commissioner on 15th November, 1951 and he directed the Income-tax Officer to make a fresh assessment. Such fresh assessment was made on 25th January 1954. The Income-tax Officer allowed the assessee interest on the advance payment from the date of payment till 30th March, 1948. The contention of the assessee was that he was entitled to interest upto 25th January, 1954. The contention on behalf of the assessee was that the date of the regular assessessment, *i.e.*, the date of the assessment under section 23 of the Act must mean the date of a valid and

1. (1948) 2 M.L.J. 436 : I.L.R. (1949) Mad. 624 : 16 I.T.R. 391.
2. (1957) 31 I.T.R. 698.

effective assessment and such assessment was only the assessment made after remand on 25th January, 1954. There was no doubt a prior assessment on 30th March, 1948, but that was not a valid or effective assessment and that would not be the assessment, which would fall within the terms of sub-section (5) of section 18-A. The learned Judges refused to accept this contention. Dealing with it, Chagla, C.J. said :

> " When one looks at the matter a little more closely, it becomes clear that, when the Income-tax Officer made the order on the 30th of March, 1948, under the provisions of this section, interest ceased to run. At that date the order made by the Income-tax Officer was the only effective and valid assessment. Can it be said that, if interest had ceased to run, the running of interest was revived when that order of assessment was set aside and a different terminus was fixed for the calculation of interest ? It seems to us that what the Legislature contemplated in using the expression " the date of the assessment " was the factual date of the assessment and it was not considering the legality or the validity of the assessment made. It wanted to fix two terminii for the calculation of interest. With regard to one terminus there was no difficulty ; that was the date of payment of advance tax by the assessee. The other terminus had to be fixed and the other terminus was the date when the regular assessment was made. That terminus having been fixed, it could not be altered by any subsequent event or by the vicissitudes through which the assessment order might pass."

Though this decision does not deal directly with sub-section (6) of section 18-A, we consider that the *ratio decidendi* of this decision will apply equally to the appeal before us. Sub-section (6) also contains two terminii. One is fixed in the sub-section (6), namely, 1st day of January in the financial year in which the tax was paid. The other terminus is the date of the regular assessment. There is also another condition in sub-section (6), which throws some light and that is this. Interest under this sub-section is payable only where in any year an assessee has paid tax under sub-section (2), or sub-section (3) on the basis of his own estimate and the tax so paid is less than 80 per cent. of the tax determied on the basis of the regular assessment. Now, if a regular assessment under section 23 has been made, as it was made in this case, it is then, that you ascertain whether this condition is satisfied. The two material amounts of tax are the amount of tax paid on the basis of the assessee's own estimate on the one hand and the tax as determined on the basis of regular assessment on the other. If the former is less than 80 per cent of the latter, then only the liability under sub-section (6) arises. On the analogy of the decision in *Sarangpur Cotton Manufacturing Co., Ltd.* v. *Commissioner of Income-tax*[1], we hold that once sub-section (6) has been applied, as in this case, and the amount ascertained on the basis of the regular assessment under section 23 as originally made, there was a finality, subject only to the provision contained in the Second Proviso, which relates to the reduction of the amount on which interest is payable as a result of an appeal, revision, or a reference. There is no provision to meet the contingency, where the amount of tax payable by the assessee is increased by proceedings taken under section 34 of the Act.

We confess that a different view can also be taken. But we should follow the well-established rule that in construing a fiscal enactment like the Income-tax Act unless the language is so clear that it could bear only one construction, the assessee will be entitled, to what one may call, ' the benefit of the doubt '. We should not be understood however as having a doubt with regard to the construction of sub-section (6) of section 18-A, which we have reached above.

In the result we allow the appeals and quash the orders of the Income-tax Officer dated 28th February, 1957 in so far as they include the payment of statutory interest under sub-section (6) of section 18-A upto the date of the re-assessment orders. The appellant will be entitled to his costs, but so far as the advocate's fee is concerned, it will be Rs. 100 for the entire batch.

V.S. *Writ appeals allowed.*

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1. (1957) 31 I.T.R. 698.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Ajax Products Limited (in voluntary liquidation), Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-Tax Act (XI of 1922), sections 2 (4) and 10 (2) (vii)—Excess realized by purchase and sale—If income from business or adventure in the nature of trade.

The existence of an intention to sell at a profit even at the time of the purchase may be a relevant factor in deciding whether the transaction of purchase and sale constituted an adventure in the nature of trade. The existence of such an intention is neither conclusive nor decisive in proving that the purchase and the subsequent sale together constituted an adventure in the nature of trade. The proved absence of an intention to sell when a given property was purchased and was subsequently sold, has however a much higher probative value in deciding the question. If there was no intention to sell when the property was purchased then the purchase and sale become independent transactions. Dissociation of the two transactions would be consistent only with the view that what was purchased was done as an investment.

Even if the purchase and sale was contemplated and provided for even at the time of the purchase, the two transactions together might lead to either inference, that the purchase constituted an investment or that the purchase and sale together constituted an adventure in the nature of trade.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, 'A' under section 66 (1) of the Indian Income-tax Act, 1922, (Act XI of 1922), in R.A.No.746 of 1954-55 (I.T.A.No.1043 of 1953-54—Assessment year 1947-48) on its file for decision on the following questions of law, *viz* :—

(1) "Whether on the facts and in the circumstances of the case, the sum of Rs 3,41,586 being the excess realised on the sale of the Jaya Spun Silk Mill Plant and Machinery constitutes income from business and so was assessable to tax ?"

(2) "Whether on the facts and in the circumstances of the case, the sum of Rs. 85,791 being the difference between the cost price and the written down value of the Jaya Spun Silk Mill Plant and Machinery is assessable to income-tax under the provisions of section 10 (2) (*vii*) of the Act ?"

R. Venkataraman, for Applicant.

C.S. Rama Rao Sahib, Special Counsel for Income-tax assisted by *S. Ranganathan*, on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The assessee was a public limited liability company. When the Company was formed with a share capital of Rs. 6 lakhs, the objectives of the Company as set out in clause 5 of the Memorandum of Association were to manufacture abrasives and steel products. The late Dewan Bahadur A.M. Murugappa Chettiar and his three sons Murugappa, Vellayan (since deceased) and Arunachalam, who constituted Murugappa and Sons, were the Managing Agents of the assessee Company. Besides the Managing Agency, that family had a large interest in the share holding. The Tribunal observed that Murugappa and his sons were "vitally interested" in the Company. Details of the share holding were not furnished in the record, and when we asked the learned counsel for the assessee if that information was available, he said that out of 6,000 shares, Murugappa and his sons held, 1,063 shares, while their wives held another 2,835 shares. None the less, the position remained that it was a public company in which the members of the public who held shares had a substantial interest.

In the rest of this judgment we shall refer to the late Dewan Bahadur Murugappa, the father, as Murugappa.

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* Case Referred No. 81 of 1955.

7th March, 1960.
(17th Phalguna, 1881, Saka).

In September, 1943, Murugappa along with three others purchased the Chhoi Silk Mills, Ltd. at Bombay which was engaged in the manufacture of filature silk. It was the period of the Second World War, and there was a good demand for the manufactured product for parachutes. Murugappa had a eight annas share. Soon however he bought out the other three members of the syndicate, and by June, 1944, Murugappa became the sole owner of the silk mills. The total outlay for the purchase was Rs. 2,88,750. It was common ground that, though the purchase had been effected in the name of Vellayan, the Mills belonged only to Murugappa. It was equally common ground that Vellayan was in charge of the silk mills at Bombay.

While Murugappa was completing his acquisition of the entire silk mills, he apparently started negotiations for the sale of the silk mills to the assessee company. It should be remembered that Murugappa and Sons were the Managing Agents of the assessee Company. Vellyan himself was one of the Directors of the assessee Company. In April, 1944, the Directors resolved to acquire the silk mills, and in May, 1944, the general body of shareholders affirmed that decision. The Memorandum of Association had to be amended to permit the assessee Company to embark on this new business. The requisite sanction of the High Court was obtained, and the Memorandum of Association was duly amended. By September, 1944, the purchase was completed. After the purchase of the silk mills by Murugappa, they were styled Jaya Spun Silk Mills. These Mills Murugappa sold to the assessee company for Rs. 4.25 lakhs. It should be remembered that Murugappa himself had spent Rs. 2,88, 750 for acquiring the Mills. Vellayan, who, as we have pointed out, was also a director of the assessee Company, continued to be in charge of the silk mills at Bombay.

Negotiations for the sale of the silk mills to the assessee Company commenced, as we pointed out earlier, even in April, 1944, though the transaction was completed only in September, 1944. From June, 1944, the assessee Company took steps to improve the silk mills after completing the purchase, and some correspondence was entered into with American business interests for the import of additional machinery.

The assessee Company worked the silk mills from September, 1944, to February, 1946. The profits the assessee Company made from 1st September, 1944 to 31st December, 1944 amounted to Rs. 51,449. In 1945 the assessee Company realised a profit of a little over Rs. 2,50,000. During the two months of 1946 the profits realised amounted only to Rs. 1,734.

By about July, 1945, the Mysore Spun Silk Mills, Ltd. opened negotiations for the purchase of the Jaya Spun Silk Mills at Bombay, from the assessee Company. Eventually the assessee Company sold the Jaya Spun Silk Mills, to the Mysore Spun Silk Mills Ltd. for Rs. 7.9. lakhs. The assessee Company, it should be remembered had purchased these Mills for Rs. 4.25 lakhs. There were further items of capital outlay, and the capital cost of the Mills to the assessee Company was Rs. 4,51,164. The profit made by the sale was Rs. 3,41,586. Besides this, there was the amount of Rs. 85,791, which represented the difference between the written down value of the machinery and the original cost price at which the assessee Company had acquired the silk mills.

In the assessment year 1947-48, the Income-tax Officer assessed the assessee Company to tax on both these items Rs. 85,791 and Rs. 3,41,586. The appeals the assessee Company successively filed before the Assistant Commissioner and the Tribunal failed, and the assessment made by the Income-tax Officer was confirmed.

The Tribunal referred the following questions to this Court under section 66 (1) of the Act:

" (1) Whether on the facts and in the circumstances of the case the sum of Rs. 3,41,586 being the excess realised on the sale of Jaya Spun Silk Mills (Plant and Machinery) constitutes income from business and so was assessable to tax ?

(2) Whether on the facts and in the circumstances of the case, the sum of Rs. 85,791 being the difference between the cost price and the written down value of the Jaya Spun Silk Mills Plant and Machinery is assessable to income-tax under the provisions of section 10 (2) (vii) of the Act ?"

It should be easy to dispose of the second of these questions. The learned counsel for the assessee realised that the position taken by the Department was unassailable, and that this amount of Rs. 85,791 was taxable in the hands of the assessee-Company under section 10 (2) (vii) of the Act. That by the sale of the entire plant and machinery the assessee-Company parted with that line of business in the course of its accounting year 1946 made no real difference to the applicability of section 10 (2) (vii). We therefore answer the second question in the affirmative and against the assessee.

To appreciate the respective contentions of the learned counsel for the assessee and the Department on the first question, it is desirable to examine what were the findings of the Departmental authorities and the Tribunal.

The Income-tax Officer treated it as income from the business the assessee-Company carried on. He pointed out that clause (15) in the Memorandum of Association provided for the acquisition and sale of properties. He therefore treated the acquisition and sale of the silk mills as a transaction in the normal course of the business activities of the assessee-Company and treated the profits of the sale as an item of income of the assessee's business. He apparently overlooked the fact, that clause 15 of the Memorandum of Association was only ancillary to clause 5 which set out the objects, and certainly clause 5 did not provide for the company conducting any business in the purchase and sale of commercial concernes like the silk mills. The Assistant Commissioner, no doubt, pointed out in paragraph 8 of his order, that business as defined in section 2 (4) of the Act included an adventure in the nature of trade. But the Assistant Commissioner did not record any specific finding, that the transaction of purchase and sale of the silk mills by the assessee-Company constituted an adventure in the nature of trade. His final conclusion was :

" I uphold the finding of the Income-tax Officer that the surplus of Rs. 3,41,586 derived from the sale of the Mills was a business profit."

As we pointed out earlier, the Income-tax Officer certainly did not take the view, that the purchase and sale of the silk mills constituted an adventure in the nature of trade, independent of the normal business activities of the assessee-Company sanctioned by the Memorandum of Association. The Tribunal pointed out in paragraph 11 of its judgment :

" There is no doubt that the business of silk mills was quite outside the assessee's usual line."

The Tribunal also recorded :

" There can be no doubt that there was that element of careful calculation, design or organisation present in making the profits and similarly in carrying out the negotiations for sale with a view to realise the profit thereby. This is a carefully and coolly calculated deal and the running of the mills for a short time was just to give that gloss that would attract would-be buyers."

There was however no express finding, whether the Tribunal confirmed the view taken by the Income-tax Officer, that it was a case of profit realised by the assessee-Company in the course of its normal business activities, or whether it was a case of profit realised by the assessee-Company from an adventure in the nature of trade, independent of its normal line of business activities. The Tribunal should certainly have been aware of the distinction between the two heads, though adventure in the nature of trade is included in the statutory definition of business, and profit arising out of an adventure in the nature of trade is also assessable as income from business. The question as framed either made no reference to any adventure in the nature of trade, obviously because there was no specific finding in the order of the Appellate Tribunal that the transanction of purchase and sale constituted an adventure in the nature of trade.

The learned counsel for the Department urged that on a fair reaading of the order of the Appellate Tribunal it should be held to have recorded a finding, that the profit in question, Rs. 3,41,586, was a profit from an adventure in the nature of

trade. The learned counsel did not seek to support the correctness of the view taken by the Income-tax Officer of the scope of clause 15 of the Memorandum of Association or of the nature of the transaction of purchase and sale of the silk mills. The learned counsel for the Department agree that, since clause (15) was only ancillary to clause 5 of the Memorandum of Association, the purchase and sale of a going commercial concern like the silk mills, which did not constitute the Company's stock-in-trade, could not be viewed as one of the normal business activities of the assessee-Company.

The Department and the Tribunal should certainly have been alive to the distinction between profits from the normal line of business activities of an assessee and a profit derived by an assessee from an adventure in the nature of trade independent of his normal line of business. When we asked the learned counsel for the Department whether the first question should not be re-drafted to bring out that the basis of the decision was an adventure in the nature of trade, as distinct from the normal business activities of the assessee, learned counsel represented that, since the word " business" would take in also an adventure in the nature of trade, it was not necessary to re-frame the question. We are not re-framing the question, though we should observe that in normal circumstances we would like to keep alive the distinction between normal business activity of an assessee and an adventure in the nature of trade, so that attention could be focussed on that aspect even in the frame of the quesion itself. Despite the fact that there was no express finding of the Tribunal in its order, or even a finding which could be gathered by necessary implication, that the transaction of purchase and sale of the silk mills entered into by the assessee-Company was an adventure in the nature of trade, we shall examine whether there was any material which could support such a finding.

We should clear the ground to some extent by pointing out that we are not now concerned with the question, whether the purchase and sale of the silk mills by Murugappa constituted an adventure in the nature of trade as far as he was concerned. We are concerned only with the question, whether the purchase and sale undertaken by the assessee-Company was an adventure in the nature of trade on which the assessee-Company embarked. Again to clear the ground, we can ignore the fact, that Murugappa originally made the purchase in the name of his son Vellayan. Apart from the fact, that despite the original purchase having been in the name of Vellayan, Murugappa's title to the Mills and his sole right to sell the property to the assessee-Company were never in issue, the purchase in the name of Vellayan was wholly irrelevant in deciding whether the assessee-Company embarked upon an adventure in the nature of trade when it purchased the silk mills from Murugappa. We have adverted to all this at some length because the Department, and the Tribunal do not appear to have kept in view the fact, that whether the purchase and sale by Murugappa constituted an adventure in the nature of trade was wholly irrelevant in deciding whether the subsequent purchase and sale by the assessee was an adventure in the nature of trade as far as the assessee was concerned.

The tribunal also appears to have overlooked one significant feature of the case. The assessee was a public company. The profits made by the Company out of the purchase and sale of the silk mills were available to all the shareholders of the Company, and neither Murugappa alone, nor Murugappa and his sons alone, nor even all the members of Murugappa's family alone could keep the whole of the profits. The Tribunal pointed out, as one of the relevant factors, that even when Murugappa purchased the Mills, the Mysore Company wanted to acquire these Mills. The learned counsel for the assessee contended that there was really no material on record apart from the oral representation made by the Departmental representative, that factually the Mysore Company was in the field even when Murugappa purchased the silk mills. Independent of that feature of the case, if the possibility of the Mysore Company eventually buying these silk mills was a relevant factor at all, one is left wondering why Murugappa, who knew it, should have sold the silk mills to the assessee-Company and let the Company make a profit by a further sale, instead of making the whole profit and keeping it to himself by a sale direct to the Mysore Company.

The learned counsel for the Department contended that it must be treated as one continous operation from the date Murugappa, as a member of the syndicate, acquired a eight annas share in the silk mills up to the date on which the assessee-Company sold the silk mills to the Mysore Company. The learned counsel contended that that was the view taken by the Assistant Commissioner on appeal, particularly in paragraph 8 of his judgment. If that was the view taken by the Assistant Commissioner, that view in our opinion was erroneous. Murugappa was the vendor and the assessee-Company was the purchaser. No doubt Murugappa was a member of the firm, Murugappa and Sons, which had the Managing Agency of the assessee-Company. But that did not establish the identity of interests between the vendor and the vendee. We have already pointed out that the Departmental authorities and the Tribunal failed to keep in view the distinction between the two sets of transactions, purchase and sale entered into by Murugappa, and the purchase and sale entered into by the assessee-Company. Whether the transaction of purchase and sale made it an adventure in the nature of trade as far as Murugappa was concerned could have no bearing on the question, whether the transaction of purchase and sale constituted an adventure in the nature of trade in the case of the assessee-Company.

We are unable to see any real basis on the material on record for any possible finding, that either when the assessee-Company commenced negotiations in 1944 to purhase the silk mills or when the Company purchased the silk mills in September 1944 the intention of the Company was to sell these Mills and at a profit to the Mysore Company.

It was a well-settled proposition of law that Chakravarthi, J., stated in *Radha Debi Jalan* v. *Commissioner of Income-tax*[1].

> " It is not correct to state broadly that a purchase, not for the purpose of holding the commodity purchased permanently but with its disposal at a profit in contemplation, can, in every case, be regarded as an indication or as evidence of an intention to trade."

The same principle had been laid down by Lord Dunedin in *Jones* v. *Leeming*[2]:

> " The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments, but *per se* it leads to no conclusion whatever."

That was quoted with approval by the Supreme Court in *Saroj Kumar Muzumdar* v. *Commissioner of Income-tax*[3].

Thus the existence of an intention to sell at a profit even at the time of the purchase may be a relevant factor in deciding whether the transaction of purchase and sale constituted an adventure in the nature of trade. The existence of such an intention is neither conclusive nor decisive in proving that the purchase and the subsequent sale together constituted an adventure in the nature of trade. The proved absence of an intention to sell when a given property was purchased, and was subsequently sold, has however a much higher probative value in deciding whether the purchase and the subsequent sale together constituted an adventure in the nature of trade. If there was no intention to sell when the property was purchased, then the purchase and sale become independent transactions. Dissociation of the two transactions would be consistent only with the view that what was purchased was purchased as an investment. The purchase by itself could not constitute an adventure in the nature of trade. The sale by itself could not constitute an adventure in the nature of trade. The sale could only then mean the sale of property acquired and held as an investment.

The Supreme Court pointed out in *G. Venkataswami Naidu & Sons* v. *Commissioner Income-tax*[4].

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1. (1951) 20 I.T.R. 176 at page 185.
2. L.R. (1930) A.C. 415 at page 423.
3. (1960) S.C.J. 464 : 37 I.T.R. 242 at 250.
4. (1959) S.C.J. 730 : (1959) 2 M.L.J. (S.C.) 31 : 35 I.T.R. 594 at 597.

"If a person invests money in land intending to hold it, enjoys its income for some time and then sells it at a profit, it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade."

That in our opinion is how the purchase by the Company and the subsequent and unconnected sale should be viewed in this case.

We do not think it necessary to embark again upon any extensive examination of the case-law on the subject of what constitutes an adventure in the nature of trade. Such an exhaustive review was undertaken by the Supreme Court in *Venkataswami Naidu & Sons* v. *Commissioner of Income-tax*[1] and again to some extent in *Saroj Kumar Mazumdar* v. *Commissioner of Income-tax*[2], As has been repeatedly pointed out, even if the purchase and sale was contemplated and provided for even at the time of the purchase, the two transactions together might lead to either the inference, that the purchase constituted an investment or that the purchase and sale together constituted an adventure in the nature of trade. It is either the one or the other with no possibility of a half way house. If however there was no intention to sell at all and the purchase and sale constituted two independent transactions, the purchase would really be consistent only with an intention to acquire and hold the property purchased as an investment. If it is an investment, the subsequent sale will not make either the purchase or the sale or both taken together an adventure in the nature of trade.

We have already pointed out that in the case of the assessee-Company there was material on record from which it can be held that at the time of the purchase in September, 1944, the Company intended to sell the Mills, and to sell the Mills to the Mysore Company. No doubt the Tribunal did not accept the case put forward by the assessee-Company, that the Mills had to be sold because Vellayan, who had been in charge of the Mills on behalf of the assessee-Company as well, had to leave India for Burma. The Tribunal pointed out that it was possible that it was because the Mills were sold that Vellayan left Bombay for Burma. The fact that that explanation of the assessee-Company for the sale was not accepted in no way helps the Department to establish that the transaction the assessee-Company entered into constituted an adventure in the nature of trade.

The Tribunal stated in its order and reiterated it in paragraph 10 of the Statement of the case :

" . . . . . . there had been that element of careful calculation, design and organisation in carrying out the negotiation for sale with a view to realise a profit."

If, as we have pointed out above, the sale was a transaction independent of the original purchase, the subsequent sale would be quite consistent with the acquisition of the property having constituted only an investment, and what was acquired as an investment was held as an investment until it was sold.

Absence of an intention to sell when the assessee-Company negotiated and purchased the silk mills, taken in conjunction with the other circumstances in the case, including the alteration of clause 5 in the Memorandum of Assosiation, leads only to one conclusion, that the assessee-Company acquired the silk mills to open a new line of business, with every expectation of that line of business being profitable, and that the purchase was really in the nature of an investment. It follows that the assessee-Company did not embark upon an adventure in the nature of trade either at the time of purchase or at the time of the sale. Once again we have to point out that there was no express finding by the Tribunal, that it was an adventure in the nature of trade. But none the less, we have examined that position in view of the contention of the learned counsel for the Department, that the assessment could be rested on the basis, that the transaction of purchase and sale amounted to an adventure in the nature of trade.

We answer the first question in the negative and in favour of the assessee.

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1. (1959) S.C.J. 730 : (1959) 2 M.L.J. (S.C.) 31 : 35 I.T.R. 594 at 597.

2. (1960) S.C.J. 464 : 37 I.T.R. 242.

As neither side has wholly succeeded in this reference there will be no order as to costs.

V.S. ——— *Reference answered partly in favour of, and partly against, the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Bharani Pictures, Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-Tax Act (XI of 1922)—Business of film production—Agreement with another to produce film—Release of rights under agreement for consideration—Receipt of consideration—Whether capital receipt or revenue receipt—Tests—Restrictive covenants in the release and injury to profit-making asset—Apportionment of and levy of tax on a receipt of mixed consideration compounded of capital and revenue receipts.

Where the work of an agent is to bring about the business between his principal and his customers the agency would be the apparatus which leads to the business and therefore so far as the agent is concerned, a capital asset. But, where however, the assessee has a business in taking up agency on behalf of others, *i.e.*, the agency is one of the businesses which the assessee has, such business, could be held to be a circulating capital or stock in trade and the compensation received in respect of injury thereto would be a revenue receipt.

A case where the partnership is not the structure of the profit earning apparatus of the assessee but rather a venture for the purpose of carrying on its existing business of film production by taking in the help of another cannot obviously come under the former category.

The tests to be applied for ascertaining whether the receipt by the assessee was a revenue receipt or a capital receipt are whether the original agreement entered into by the assessee was in the course of its carrying on its business and whether the termination of the agreement was done in the course of its business. If the answers are in the affirmative any compensation received for the termination of such agreement would be a revenue receipt.

The assessee is a firm engaged in the production of films. The film in respect of which the sum was received was one among others. It was only during the course of production that the assessee entered into a partnership agreement. The partnership is one entered into in the ordinary course of trade.

It is evident from the terms of the agreement that the parties did contemplate a sale of the picture to an outsider or even *inter se* the partners even before the completion of the picture. The joint venture was only for obtaining a commercial asset that is, to secure a stock-in-trade. If that venture fails it is only an incident in the assessee's business. It is not such a fundamental asset like a managing agency agreement which, if terminated, would put an end to the entire profit-earning structure. There has been no injury or abandonment of any capital asset of the assessee so as to make the compensation received under the agreement a release of the capital receipt.

Where the assessee covenanted not to produce a picture on the same subject, the covenant probably exceeded what was merely incidental to the transfer of rights evidenced by the release. Whether such an obligation cast on the assessee was one purely for the unhampered exploitation of the rights released or it transgressed those limits so as to amount to an injury to the profit-making asset is a question to be decided on the facts of the case.

If a consolidated payment was received for a mixed consideration compounded of elements, some of which were of trading or revenue nature, others being the realisation of a capital asset, the taxing authorities should apportion the receipt and levy tax on that portion of the amount which represented revenue receipt.

The new case that the consideration paid for the release should be allocated between the two heads of capital and revenue was not allowed.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act (XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act (VII of 1939), in 66 R.A. No. 1040 of 1951-52 (Madras) of I.T.A. No. 5080 of 1951-52 (Assessment year 1949-50) on its file for decision on the following questions of law, *viz.*—

" 1. Whether on the facts and circumstances of the case the Appellate Tribunal was justified in including the entire amount of Rs. 75,815 in the income of the assessee in the year of account without allocating the same on the time basis after allowing depreciation only at 60 per cent. into account?

* Case Referred No. 39 of 1955.

11th March, 1960.
(21st Phalguna, 1881, Saka.).

2. Whether on the facts and circumstances of the case the amount of Rs. 32,683 does not amount to a capital receipt not liable to be assessed ?"

K. Srinivasan, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for the Income-tax and *S. Ranganathan*, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—The following questions were referred to us under section 66 (2) of the Indian Income-tax Act:

" 1. Whether on the facts and circumstances of the case, the Appellate Tribunal was justified in including the entire amount of Rs. 75,815 in the income of the assessee in the year of account without allocating the same on the time basis after allowing depreciation only at 60 per cent. into account ?

2. Whether on the facts and circumstances of the case the amount of Rs. 32,683 does not amount o a capital receipt not liable to be assessed ?"

The questions arise in relation to the assessment of the Bharani Pictures for the year 1949-50, the year of account ending with 31st December, 1948. The assessee is a registered firm consisting of two partners, Mrs. P. Bhanumathi, a cinema actress, and her husband, P. Ramakrishna Rao. The firm was engaged in the business of producing cinematograph films, and it commence its business in September, 1945. The first of the two questions set out above relates to the assessment of the profits earned from one of the pictures produced by the firm, *viz.*, Rathanamala. When the case was taken up for hearing the learned Advocate for the assessee intimated that the assessee does not want to press for the decision of this Court on question No. 1. We, therefore, consider it unnecessary to offer our opinion on the point covered by the question.

The other question relates to a fi'm in Tamil 'Pulendran ', which the assessee originally planned to produce. Towards that end the assessee also engaged certain artists and technicians. Mrs. Bhanumathi, one of the partners of the assessee firm, was herself the principal actress in the proposed film. Soon thereafter, the assessee took a partner, M/s. Balaji Pictures, Madras, for the venture. The terms of the partnership agreement were reduced to the form of a document on 26th July, 1946. Under that agreement, the cost of production of the picture and collections therefrom were agreed to be shared in the proportion of 2: 1, by the assessee and M/s. Balaji Pictures, its partner. It is unnecessary for the purposes of this reference to refer to the other terms of the agreement except clauses 4, 5 and 10. By the first of the abovementioned clauses, the parties agreed that neither of them could sell, mortgage or create any charge in respect of their shares in the negative of the picture to be produced without the consent of the other. Under clause 5, it was agreed that, if monies were realised by the sale of the rights in the negative of the picture, whether as a whole or in part, or whether before the production of the picture or afterwards, the parties were to share the proceeds in the same proportion as their interest in the venture. Clause 10 ran as follows :—

"That if during the course of production, any reasonable sale offer either in part or whole comes, both the parties shall mutually agree and effect the sale for mutual benefit. But if under any circumstances the offer is not accepted by any one of the parties, such party should undertake to purchase it for himself or cause sale for more amount than what is offered by others."

The covenants referred to above indicate that the object of the parties was to undertake the production of the picture as a commercial transaction, to produce and exploit the picture or to sell it away if it could be done to the best advantage of the partners, whether it be before or after its production. A sale of the rights of a partner in the film as between partners was also contemplated, and provided for.

The assessee did not itself advance any substantial sum of money ; it entered into a financial agreement with one D. Rama Doss, who agreed to finance half the amount required by the assessee for the production of the picture, on his being paid half share in the collections out of the assessee's 2/3 share in the picture. Rama Doss paid Rs. 35,100 towards his share of the finance. The process of production commenced,

The artists were paid some salary, and certain other expenses were also incurred. A sum of Rs.39,957-15-2 was spent by the assessee, that is, a little over what Rama Doss had paid. Disputes then arose between the partners. The parties agreed to adjust their difference, by the assessee retiring from the venture on being paid a certain amount, and Balaji Pictures and Rama Doss joining together to complete the picture. The agreement is in writing , and is dated 25th August, 1948. Under its terms, the assessee was paid a further sum of Rs. 37, 500 in full quit of its interest in the picture, and the amounts expended for the same. It was also agreed that Mrs. Bhanumathi and a few of the actors who had evidently been engaged by the assessee, were to be released from their obligation to act in the picture. The effect of the transaction was the assessee got Rs.35, 100 from Rama Doss and Rs.37,500 under the release deed, while the expenses amounted to only Rs. 39,957-15-2 the profit being Rs. 32,642-0-0.

It is the character of this receipt that has to be adjudged in this reference. It is necessary, therefore, to consider the purpose for which the payment was made to the assessee under the release deed, dated 25th August, 1948. That document states that the sum of Rs. 37,500 is paid to the assessee in consideration of its giving up its picture and that it shall have thereafter no interest in the production and management of the picture. The document contains certain other provisions as well. Clauses 4 and 7 therein contain certain covenants of a restrictive nature.

"*Clause* 4. Party No. 1 (assessee) shall deliver or cause to be delivered to party No. 2 (M/s. Balaji Pictures and Rama Doss) all positives, negatives, scripts, songs, dialogues, etc., relating to the said picture except the recorded music of Mrs. P. Bhanumathi to which parties Nos. 2 and 3 shall have no claim whatever.

Party No. 1 shall not be entitled to use or cause to be used in any manner the said recorded music of Mrs. P. Bhanumathi."

Clause 7. Party No. 1 shall not be entitled to produce or particpate in producing any picture relating to the same subject as the said " Pulandiran " in any language for a period of 10 years."

Clauses 9 and 10 provide that if two of the artists, who were released from obligation to further participate in the picture, were to act in the picture, the assessee was to be paid a stipulated sum of money. Clause 2 of the Release deed would appear to suggest that the entire consideration paid was for the release of the assessee's rights in the picture : *prima facie* there is nothing to indicate that the consideration paid was for the restrictive covenants as well. But, at the same time, it must be remembered that the release deed is single and indivisible, and the covenants contained therein being part of the agreement, it could be said that it was as much supported by the consideration as the actual release of the right in the picture.

The Income-tax Officer included in the assessment the sum of Rs. 32,642 as the profits of the assessee. Both the Appellate Assistant Commissioner and on further appeal the Tribunal concurred with the view of the Income-tax Officer and held that that sum clearly represented a trade receipt of the assessee liable to be assessed. That view is challenged in this reference.

For the assessee, it is contended that, on a true construction of the agreement dated 25th August, 1948 the amount of Rs. 37,500 paid to the assessee would represent only a compensation for the giving up by the assessee of its rights in the partnership firm with the Balaji Pictures. It is contended that an interest in a joint venture was property and that as the venture itself was the profit-earning apparatus, anything received for giving up that right would be a capital receipt. Reliance was placed on the decisions in *Commissioner of Income-tax* v. *Vazir Sultan & Sons*[1], and *Godrej & Co.* v. *Commissioner Income-tax*[2], to support the contentions. Those cases, however, related to abridgement of rights of an agent under sales or managing agency agreement. It was held that compensation given for the abridgement of such rights, would partake the character of a capital receipt, there having been, as a result of the agreement, a deterioration or injury to the business structure or profit-earning apparatus of the assessee.

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1. (1959) 36 I.T.R. 175.
2. (1960) S.C.J. 166 : (1960) 1 An.W.R. (S.C.) 55 : (1960) 1 M.L.J. (S.C.) 55. : 37 I.T.R. 381.

But an agency contract cannot always be considered as a profit-earning apparatus so as to render any compensation for an injury caused to that contract to be treated as a capital receipt. Where the work of an agent is to bring about the business between his principal and his customers, the agency would be the apparatus which leads to the business, and, therefore, so far as the agency is concerned, a capital asset. But where, however the assessee has a business in taking up agency on behalf of others, *i.e.*, the agency is one of the businesses which the assessee has, such business could be held to be a circulating capital or stock in trade, and the compensation received in respect of injury thereto would be a revenue receipt. The basis of the distinction is clearly laid down in *Commissioner of Income-tax* v. *Rai Bahadur Jairam Valji*[1].

A case like the present, where the partnership is not the structure of the profit-earning apparatus of this assessee, but rather a venture for the purpose of carrying on its existing business of film production by taking in the help of another cannot obviously come under the former category. That does not, however, mean that in all cases the right of a partner in a firm is not a right of property, but a commercial asset. The question would depend on nature of the partnership and the business.

In *Rangaswami Naidu* v. *Commissioner of Income-tax*[2], to which one of us was a party, it has been held that the right of a partner in a firm is property, and would form a capital asset of the partner. The question that arose for consideration in that case was whether the profit made in the sale of partner's interest in the firm (that being authorised by the terms of the partnership) was a capital gain. It was held that congeries of rights, which the partner enjoyed in the partnership firm, should be construed as a profit yielding asset, and, therefore, a capital asset. The decision in that case related to the sale of the interest of a partner in the firm, whose business was that of a Managing agent to a certain Cotton Mill. A sale of a partner's share in such a case would certainly be a sale of the capital asset on the principle recognised in the decisions of the Supreme Court referred to above.

Where, however, a partnership is entered into for the purpose of doing one of the items of the business, it cannot be said that the partnership is a structure of the business but on the other hand it would be one entered into in the ordinary course of its business. In *Commissioner of Income-tax and Excess Profits Tax* v. *South India Pictures*[3], the assessee carried on business in the distribution of films. It was his practice to produce or purchase films and distribute the same for exhibition. In the course of the business, the assessee advanced monies to certain picture producing concern, and under that agreement with the concern, acquired certain rights of distribution over three films manufactured by them. After exploiting the rights of distribution of those pictures for some time, and after the monies advanced by the assessee had been fully re-paid, an agreement was entered into by the assessee with the producers, cancelling the agreement relating to the distribution rights of the three films, in consideration of which the assessee was paid a sum of money. The question that arose for consideration by the Supreme Court was whether that receipt was of capital or revenue nature. It was held that the compensation paid was not for preventing the assessee from carrying on his business, but one paid in the ordinary course thereof to adjust the rights between the assessee and the producers of the firm, and that the agreement cancelled could not be deemed to be such a fundamental asset of the assessee, on which his whole trade had been built, so as to constitute the frame work of the profit-making apparatus. From the majority judgment of the Supreme Court, it is clear that the tests to be applied for ascertaining whether a particular receipt by the assessee in such circumstances was a revenue or capital receipt are (1) whether the original agreement entered into by the assessee was in the course of its carrying of its business, and (2) whether the termination of the agreement was one done in the course of its business. If answers to the questions

1. (1959) S.C.J. 284 : (1959) 1 M.L.J. (S.C.) 116 : (1959) 1 An.W.R. (S.C.) 116.
2. (1957) 31 I.T.R. 711.
3. (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.) 21 : 29 I.T.R. 910.

are in the affirmative, any compensation received for the termination of such agreement would be a revenue receipt.

The assessee is a firm engaged in the production of films. Pulandiran was not its only venture ; it was only a part of its business activity. It had already started production of another picture, Rathanamala. It had also engaged artists for the production of Pulandiran. It was only during the course of its production that it entered into partnership with Balaji Pictures. Such contracts are but a normal feature in the business relating to a film production, it facilitates the coming in of the necessary finance, and brings together varied talents whose combined effort would go to make a better or more successful picture. That such combinations are common, is shown by the fact that the assessee itself entered into a financial arrangement with Rama Doss, agreeing to give him one half share of its proceeds. A partnership, as in the present case, for the production of the film should be held therefore, to be one entered into in the ordinary course of trade.

The question then is whether the termination of the agreement was made in the course of its business. It is evident from the terms of the agreement of partnership tha the parties did contemplate a sale of the picture to an outsider or even *inter se* the partners even before the completion of the picture. It is, no doubt, true that the partnership agreement evidences a joint venture, but the joint venture was only for obtaining a commercial asset, that is, to secure a stock-in-trade. If that venture fails, it is only an incident in the assessee's business. It is not such a fundamental asset like a managing agency agreement, which, if terminated, would put an end to the entire profit-earning structure. Applying the principle of the decision in *Commissioner of Income-tax and Excess Profits Tax* v. *South India Pictures*[1], we are of opinion that there has been no injury or abandonment of any capital asset of the assessee, so as to make the compensation received under the agreement a release of the capital receipt.

It was next contended that the two restrictive covenants in paragraphs 4 and 7 of the agreement of release, dated 25th August, 1948 would show that the contract was not one merely dealing with a commercial asset, but one that affected the future business of the assessee, and that the compensation paid should be held to be one for an injury done to the profit-making asset. The contention was raised on the basis of the principle laid down in *Beak* (*H. M. Inspector of Taxes*) v. *Robson*[2]. In that case, the assessee agreed to serve as director of a company on certain terms as to salary and bonus. The agreement provided that, if his service agreement was terminated by the company for any of the reasons which enabled them so to terminate, he, in consideration of a payment of a sum of £ 7,000, was not to compete directly or indirectly with the company within a radius of 50 miles of its place of business, until five years had elapsed after the termination of his service. It was held that the payment of £7,000 was made for giving up a right wholly unconnected with his office and being operative only after he ceased to hold that office, could not be held to be emoluments of the office. It must be noticed that the payment in the case was made not in consideration of any service rendered or to be rendered as an employer, but for a covenant not to do business after the termination of the service and as such was not a salary or profit from business. The fact that the covenant was embodied in the service agreement as one of the terms on which the assessee was taken into service, was held to make no difference.

That, however, is not the position in the present case. As pointed out already, clause (2) of the release deed states that Rs. 37,500 was paid "in consideration of the amount of expenses, already incurred by party No. 1 (assessee) and in consideration of their giving up their rights in the picture as aforesaid". "The word "aforesaid" refers to clause No. (1) which states that the assessee was to have no interest in the picture, while the other party to the release was entitled to produce and exploit it. Thus the consideration of Rs. 37,500 is not expressed to be for any restrictive or

1. (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.) 21 : 29 I.T.R. 910.

2. L.R. (1943) A.C. 352 : 25 T.C. 33.

future covenant as the one in *Robson's case*[1]. As we pointed out already it can be argued that the consideration paid was for the entire agreement including the covenants. The question then would be whether those covenants are such that the position of the compensation relating to it could be held to be a capital receipt. In clause (4) to which reference has been made earlier in the judgment, both the parties to the agreement agreed not to use the recorded music of Mrs. Bhanumathi in any manner. It must be remembered that Mrs. Bhanumathi, in addition to being a partner in the assessee-firm, was herself an actress in the picture, Pulandiran, and was to be remunerated by a salary. Certain of her songs had evidently been recorded before the release deed was executed. Those songs were part of the picture. Mrs. Bhanumathi, who had received salary for the songs recorded, could have no rights in the same. The partners would undoubtedly have rights to her recorded music, but the assessee had, for a consideration, given up its rights. The covenant of the assessee not to use such recorded music, cannot be deemed to be a restrictive covenant, because neither Mrs. Bhanumathi nor the assessee-firm had any right to those songs, they having already parted with their respective rights. The mere circumstance that the other party to the agreement also released his rights to use recorded music, cannot mean that the assessee would have, under the law, any right which they gave up by reason of the covenant. The covenant in clause (4) is not unconnected with the commercial asset, for which the assessee was paid.

Clause (7) prohibits the assessee from producing any picture relating to the same subject as Pulandiran for a period of 10 years. It is contended for the Department that that is an ordinary incident of every contract of sale of a film not to infringe its copy right. But, it must be remembered that there was no completed picture by the time when the release deed was executed. There could, therefore, have been no copy right. What, therefore, the agreement provided for was to prevent the retiring partner from taking advantage of his position and produce a rival picture which would affect the commercial value of the picture in respect of which he was paid Rs. 37,500. It is fairly well recognised that the life of cinematograph film would be about 3 years, after which period the profit-earning capacity would be next to nothing. When, therefore, the assessee covenanted not to produce a picture on the same subject as ' Pulandiran ' the covenant probably exceeded what was merely incidental to the transfer of rights evidenced by the release. Whether such an obligation cast on the assessee was one purely for the unhampered exploitation of the rights released, or it transgressed those limits, is a question to be decided on the facts of the case, *e.g.*, how long it would take to complete the film Pulandiran and how long its value as a commercial asset would last. If it were found that the covenant exceeded the limits of what is necessary for the exploitation of the contemplated picture, the covenant to the extent of the excess would be restrictive covenant independent of the released rights and the principle of *Robson's case*[1], would perhaps apply.

In *Higgs* (*H. M. Inspector of Taxes*) v. *Oliver*[2], a question arose with reference to a contract of employment. An actor agreed to give his exclusive services to a film company both as director and actor. For the services rendered, he was paid. There was a further agreement, by which the actor, in consideration of a sum of money received by him, undertook not to act in, produce or direct any film for any other person for a period of 18 months. It was held that the receipt was not one earned by the exercise of any vocation by the assessee, and, therefore, not liable to tax. That was a case where the original agreement of services was fulfilled and completed, and the subsequent agreement which embodied restrictive covenant was an independent one. In dealing with the question whether the compensation in such a case could be said to be a capital receipt, the Master of Rolls, after referring to the decision in *Glenboig's case*[3], observed at page 146 :—

" I think there is a true analogy between such an arrangement as that or between a sale of one of a trader's capital assets and a restrictive covenant of a substantial character entered into by a

1. L.R. (1943) A.C. 352 : 25 T.C. 33.
2. (1952) 33 T.C. 136.
3. (1922) 12 T.C. 427.

trader relating to trading. I think Sir Frank was disposed to agree that if a trader or a professional man for a money consideration covenanted to give up his trade or profession for the rest of his life, then it would be difficult to say that the money received was " profits or gains accruing or arising from his trade or profession." On the other hand it is not difficult to see that a restriction of a very limited or partial character might less easily be taken out of the ambit of the taxing provision. One example in the argument was that of an actor who covenanted for a limited period not to act for one particular company out of a large number. I gave myself the example of an actor who covenanted for a limited period not to act under his own or well-known stage name. But between the two extremes there is a large area, and for myself I am disposed to think that within that area it may well be a matter of degree. In so far as it is a matter of degree it would be, I think, a question of fact."

The question whether the agreement in the present case not to compete by producing a film similar to Pulandiran was purely incidental to the release of the rights of the assessee in the picture or whether it was independent of it in regard to any portion thereof, was not considered either by the Department or Tribunal. That aspect of the matter was not put forward by the assessee before him. If, however, it were to be held (1) that the consideration for the release was intended to cover both the release of the rights in the picture and the restrictive covenants, and (2) that the restrictive covenant in clause (7) was independent (in part or whole) of the rights in the picture given up, there would be a case for allocating the respective parts of the consideration, and ascertain the extent of taxability. In *Sadasivam* v. *Commissioner of Income-tax* [1], a Bench of this Court, to which one of us was a party, held that, if a consolidated payment was received for a mixed consideration compounded of elements, some of which were of trading or revenue nature, others being the realisation of a capital asset, the tax authorities should apportion the receipt and levy tax on that portion of the amount which represented revenue receipt. In the course of the judgment, reference was made to the decision in *Carter* v. *Wadman* [2], where, in consideration of the termination of the employment of the assessee, a certain compensation was given. That amount represented the remuneration payable to the assessee and also damages for the termination of the employment which was in the nature of capital receipt. It was held that, where a lump sum payment was made in respect of two different matters, one of which would lead to an assessment for tax and the other would not, the Commissioner would have to apportion the sum.

But there are several difficulties in adopting the principle of that decision in the present case. The release deed states that the consideration paid was only for the giving up of the rights by the assessee in the picture. There are no materials to show that the restrictive covenant was independent of the main contract of release. No facts were placed by the authorities to evaluate the consideration referable to the covenant contained in clause (7). The question was not even raised before the Tribunal or the Officers. The question referred to us does not even comprehend a subsidiary position whether any part of the sum of Rs. 32,683 would amount to a capital asset. The new case that the consideration paid for the release should be allocated between the two heads of capital and revenue cannot now be allowed.

Our answer to the question referred to us is against the assessee, that is, that the sum of Rs. 32,683 would not represent a capital receipt, and is liable to be assessed. The assessee will pay the costs of the Department. Counsel's fee Rs. 250.

V.S. *Reference answered against the assessee.*

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1. (1955) 2 M.L.J. 526 : 28 I.T.R. 435.
2. 28 T.C. 41 (C.A.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

S. Raman Chettiar .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), sections 34 and 22—Effect—Scope of—Procedure under—When could be invoked.

The First proviso to section 34 (1) of the Income-tax Act requires that no notice should issue under the section unless the Officer has recorded his reasons for doing so and the Commissioner is satisfied with such reasons recorded. A notice issued without complying with the requirements of the Proviso will be invalid and subsequent proceedings taken in pursuance of such a notice cannot be valid either. Where an assessee has filed a return in pursuance of section 22 (1) or (2) of the Act, however belated it may be, the Income-tax Officer cannot ignore the return and proceed otherwise either under section 23 (3) or 34 (1) (*a*). A return submitted in response to an invalid notice under section 34 cannot be related to that notice and could only be treated as a valid return filed by the assessee under section 22 (3) of the Act and it is not open to the Department to ignore the return and issue fresh notice under section 34 (1) (*a*) of the Act.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act (XI of 1922) in R.A. No. 853 of 1955-56 on its file (I.T.A. No. 859 of 1956-55....Assessment year 1944-45) for decision on the following question of law, *viz* :—

"Whether the re-assessment under section 34 completed on 30th June, 1953 for the year 1944-45 is valid ?"

S. Swaminathan and *K. Ramagopal*, for Applicant.

S. Ranganathan, for *C. S. Rama Rao Sahib*, Special Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—The question that has been referred for the determination of this Court is

"whether the re-assessment under section 34 completed on 30th June, 1953 for the year 1944-1945 is valid ?"

The facts of the case are in brief as below.

Acting on the information that the assessee had income assessable for the assessment years 1944-1945 and 1945-1946, notices under section 34 were issued in respect of both these assessment years on 3rd April, 1948. An assessment was in due course made by the Income-tax Officer on 27th October, 1950 for the year of assessment 1945-1946, the accounting year for which had ended on 31st March, 1945. The ground upon which proceedings were initiated under section 34 appears to have been the information, that the assessee had been dealing in immoveable properties and had made a profit of Rs. 88,760 in consequence of such transactions. Apparently, the notice under section 34 issued in relation to the assessment year 1944-1945 was not pursued further as the whole amount was brought to tax in 1945-46. An appeal was carried in due course to the Income-tax Appellate Tribunal, which came to the conclusion that the transactions in landed properties constitituted ventures in the nature of trade, profits from which were undoubtedly assessable. It may be mentioned that as against the sum of Rs. 88,760 determined as profits from the sale of lands, the Appellate Assistant Commissioner in the appeal before him excluded a sum of Rs. 6,000 for certain reasons which are not now relevant, and the Tribunal itself deducted a further sum, thereby reducing the amount of profits to Rs. 79,760.

The Tribunal further held that the transactions leading to the profit in question covered both the assessment years, and that only a sum of Rs. 33,000 was profit

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*Case Referred No. 114 of 1956.

3rd January, 1961.
(13th Pausa, 1882, Saka.

assessable in the assessment year 1945-1946. In coming to this conclusion, the Tribunal computed the quantum of profits attributable to the earlier assessment year 1944-1945, which it fixed at Rs. 46,760. In so far as the appeal, which the Appellate Tribunal was seized of at the time, which related to the assessment year 1945-1946 was concerned, the Tribunal directed that this sum of Rs. 46,760 which related to the earlier assessment year, could not be taxed in the assessment for the year 1945-1946. It, however, observed :

" The Income-tax Officer is at liberty to take such action as he may be advised about the assessee's liability for the earlier year 1944-1945."

Following up the observation of the Tribunal extracted above, the Income-tax Officer issued a further notice under section 34 on 27th February, 1953 to the assessee. He obtained the prior sanction of the Commissioner for these proceedings and brought to tax this amount of profits of Rs. 46,760, as determined by the Tribunal to relate to the assessment year 1944-1945. This assessment order was made on 30th June, 1953. An appeal was taken to the Appellate Assistant Commissioner attacking the assessment proceedings under section 34 of the Act as illegal. The ground that was taken before the Appellate Assistant Commissioner was that there has been no omission or failure on the part of the assessee to disclose fully and truly all material facts at the time of the completion of the assessment for 1945-46, that section 34 (1) (*a*) was not attracted and that action under section 34 (1) (*b*) was barred by limitation. This objection did not find favour with the Appellate Assistant Commissioner who held that in so far as the proceedings for 1944-1945 were concerned, the Income-tax Officer did not have information of the escape of income from tax, and that since any escape of income in relation to the assessment year 1944-1945 came to light only in the proceedings relating to 1945-1946 as a result of the finding of the Tribunal, the action under section 34 (1) (*a*) was competent. The view was also taken that the provision relating to the period of limitation stood excluded as the Income-tax Officer only proceeded to give effect to this specific finding of the Income-tax Appellate Tribunal with regard to assessee's liability to tax for the assessment year 1944-1945.

The appeal to the Tribunal failed, and on the application of the assessee, the question set out earlier has been referred to this Court.

We have already stated that in respect of both assessment years, notices were issued under section 34 on 3rd April, 1948. We are now concerned only with the assessment year 1944-1945 in this reference. The assessment that was made by the Income-tax Officer on 27th October, 1950 related to the assessment year 1945-1946, and in the view that he took that the entire quantum of profits arising from the sale of lands was assessable for this later year, he took no further proceedings in respect of the assessment year 1944-1945. Reference was made to this in the order of the Appellate Assistant Commissioner wherein he observed :

" . . . . . finding that further proceedings would be infructuous, the Income-tax Officer appears to have dropped the proceedings. The remarks dated 9th February, 1953, on the order sheet for the assessment year 1944-1945 are as under :—

" Please see 1945-46 file. As per Income-tax Officer's orders that this would be infructuous, further proceedings were not taken."

It however appears that it was in consequence of the finding of the Tribunal in the appeal relating to assessment year 1945-1946 that a further notice under section 34 was issued on 27th February, 1953 for the assessment year 1944-1945. The first question that we have to determine is, what was the scope of the proceedings under section 34 at the time when they were initially instituted in 1948.

At the relevant time, section 34 had been amended by Act XLVIII of 1948; though this Act received the assent of the Governor-General on the 8th September, 1948, the amendments were made retrospective in their operation to take effect from the 30th day of March, 1948. The main part of section 34 was to all intents and purposes the same as it is now, except that the period of eight years prescribed for dealing with cases falling under section 34 (1) (*a*) has now been enlarged. The

period of four years fixed for dealing with cases falling under section 34 (1) (*b*) however remains the same. But important changes were effected in the latter parts of the section. The First proviso to section 34 as amended by Act XLVIII of 1948 required that the Income-tax Officer shall not issue a notice under section 34 (1)

> " unless he has recorded his reasons for doing so and the Commissioner is satisfied with such reasons recorded that it is a fit case for the issue of such notice."

It is conceded by the learned counsel for the Department that in respect of the notice that was issued on 3rd April, 1948 the requirements of this proviso were not complied with. In pursuance of this notice, the assessee filed a return on 4th September, 1948. As has been stated already, he filed returns in respect of both years, but no action was taken on the return relating to the assessment year 1944-1945. If, therefore, the notice that was issued on 3rd April, 1948 under section 34 of the Act was invalid for non-compliance with the requirements of the proviso referred to, it would necessarily follow that the subsequent proceedings could not be validly related to section 34 of the Act at all. Nevertheless, the assessee in fact filed a return for the assessment year 1944-1945, and the question arises, whether so long as this return was with the Department and remained undisposed of, the Department could at a later point of time issue a further notice under section 34 which in this case was so issued on 27th February, 1953.

Section 22 of the Income-tax Act deals with the return of income. Section 22 (1) relates to a general notice and prescribes a period of sixty days within which a return should be filed. Sub-section (2) deals with individual notices whereby the Income-tax Officer is enabled to call upon the assessee to submit a return within such time as he may fix. Sub-section (3) enables an assessee who has filed a return either under sub-section (1) or sub-section (2) to file a revised return in case he discovers any omission or wrong statement in the return already filed. This sub-section also enables an assessee to file is return notwithstanding that the return is not filed within the time fixed either under the general notice under section 22 (1) or the special notice under section 22 (2) at any time before the assessment is made : that is to say, even if an assessee is late in filing his return, so long as he files it before the assessment is actually made upon him, that return has to be dealt with by the Income-tax Officer. Coming to the assessment, section 23 (4) of the Act enables the Income-tax Officer to make the assessment to the best of his judgment if the assessee fails to make the return required by any notice given under sub-section (2) of section 22 or has not made a return under sub-section (3) of that section. Action under section 23 (4) is competent only when by the time the Income-tax Officer takes up the case for assessment, no return has been filed. But if a return, however belated it may be having regard to section 22 (1) and section 22 (2), is made, the Income-tax Officer cannot proceed under section 23 (4) to make a " best " judgment " assessment.

The assessment in this case puports to have been made under section 23 (3) and section 34. The view taken by the Income-tax Officer was that the assessee had not filed a return except in response to the notice that was issued on 27th February, 1953, and that the case fell within section 34 (1) (*a*) of the Act ; that is to say, there had been an omission or failure on the part of the assessee to make a return of his income under section 22. In holding so, he ignored the circumstance that a return had been filed by the assessee on 4th September, 1948 in response to the earlier notice purporting to be under section 34 which was issued on 3rd April, 1948. If the proceedings that were initiated on 3rd April, 1948 under section 34 were invalid under the law as it obtained on that date for want of the prior sanction of the Commissioner, the submission of the return cannot be related to that notice. Notwithstanding that the return was the result of an invalid notice, the return itself cannot be ignored or disregarded by the Department. A similar case came up for consideration of the Supreme Court in *Commissioner of Income-tax* v. *Ranchhodas Karsondas*[1]. In that case, a return showing an income below the

1. (1959) 36 I.T.R. 569.

taxable limit was submitted voluntarily in answer to the general notice under section 22 (1) of the Income-tax Act. That return was not acted upon and the Income-tax Officer issued a notice purporting to be under section 34 and completed the assessment thereon. The contention of the assessee was that the return he had submitted under section 22 (3) of the Act should have been acted upon and that there was no scope for the issue of a notice under section 34. The High Court of Bombay held that :

" the Department ought to have issued the notice under section 22 (2) within the assessment year and if no return was made within the time fixed by the notice, the Department should have proceeded under section 23 (4) to a ' best judgment assessment '. The other alternative for the Department was to issue a notice under section 34 of the Act if the period for sending a notice under section 22 (2) had expired. But it could not issue a notice under section 34 after a return was already made before it."

Their Lordships of the Supreme Court construing section 34 (1) observed:

" It would appear from this that if the return filed on 5th January, 1950, was a return of income, there was no failure or omission on the part of the assessee, so as to bring the matter within section 34 (1) (*a*) of the Act, and sub-section (3) of section 34 would then apply to the case limiting the period to four years. In that event, the assessment should have been completed on or before 31st March, 1950. But if the return made by the assessee was no return at all, then the conditions under the first sub-section of section 34 obtained, and the assessment could be completed within one year of the date of service of the notice (3rd March, 1950) *i.e.*, on or before 2nd March, 1951. . . . ."

Dealing with section 22 of the Act, they proceeded to notice :

" It will be seen from this, that, as the Bombay High Court correctly pointed out, there is a time limit provided in sub-sections (1) and (2) and the failure or omission occurs when that period passes, but sub-section (3) allows a *locus poenitentiae* before the assessment is actually made. There is no dispute that a return could be filed in this case, late though it was. The controversy rentres round the fact that the return, when it was filed, disclosed an income which was below the maximum not chargeable to tax. . . . ."

It seems to us that, even on the admitted position that the notice under section 34 issued on 3rd April, 1948 was invalid, it would follow that a return though furnished in consequence of that notice was a valid return filed by the assessee under section 22 (3) of the Act, and that it is not open to the Department to ignore that notice and issue a further notice under section 34 (1) (*a*) of the Act on the assumption that there had been an omission or failure on the part of the assessee to make a return of his income under section 22.

The assessment year was 1944-1945. Under section 34, sub-section (3) no order of assessment under section 23 to which section 28 (1) (*c*) applies or of assessment or re-assessment in cases falling under section 34 (1) (*a*) shall be made after the expiry of eight years, and no order of assessment or re-assessment in any other case shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable. In cases, however, where a notice under section 34 (1) had been issued within the time prescribed, the assessment or re-assessment made in pursuance of such notice could be made before the expiry of one year from the date of the service of the notice, even if that period exceeds the period of eight or four years, as the case may be. Section 28 (1) (*c*) was inapplicable to the facts of this case. It, therefore, follows that the assessment for the year 1944-45 had to be completed within a period of four years from the end of that assessment year ; that is to say, since the assessee had submitted a return of the income on 4th September, 1948, and it has to be regarded as a return made under section 22, sub-section (3), for the reason that the purported notice under section 34 issued on 3rd April, 1948 was invalid, the assessment had to be completed by the 3st March, 1949.

Learned counsel for the Department argues that, even if the notice under section 34 issued on 3rd April, 1948 is invalid, the return submitted by the assessee on 4th September, 1948 is still not a voluntary return and that it has to be ignored. *Commissioner of Agricultural Income-tax* v. *Sultan Ali Charami*[1], has been relied upon

1. (1951) 20 I.T.R. 432.

in this connection. This decision of the Calcutta High Court was later explained in *R. K. Das & Co.* v. *Commissioner of Income-tax, West Bengal*[1]. It is not necessary to examine the facts and the reasoning upon which those decisions proceeded. It would be sufficient to indicate that in *Commissioner of Income-tax* v. *Ranchhoddas Karsondas*[2], those decisions were examined by their Lordships of the Supreme Court. Though the question that was therein considered related to the submission of a return which showed an income below the taxable limit, still the point was whether such a return would be a return in law. The Supreme Court observed :

"It is a little difficult to understand how the existence of a return can be ignored once it has been filed."

They proceeded to deal with the matter where the return showed an income below the taxable limit, and held that a person may legitimately consider himself entitled to certain deductions and allowances yielding a non-taxable income and yet may file a return to be on the safe side. But, nevertheless, it is a return such as the assessee considers represents his true income. The ratio of this decision appears to us to be that a return filed under circumstances as in the present case cannot be rejected or ignored by the Department.

We have already indicated that the notice that was issued under section 34 on 3rd April, 1948 was invalid, and that though the return that was filed was in response to that notice, the return itself cannot ,for the reason be regarded as having been compelled by the issue of that notice. This view finds ample support in *Commissioner of Income-tax, Bihar and Orissa* v. *Maharaja Pratap Singh Bahadur*[3]. That case also related to the issue of a notice when section 34 of the Income-tax Act as re-enacted by Act (XLVIII of 1948) was in operation. Though the Act itself was passed in September, 1948 it was given retrospective effect from the 30th of March, 1948. Notice under section 34 was in that case issued on the 8th August, 1948 and it failed to comply with the conditions laid down in the *Proviso* to section 34 (1) which made it mandatory that the prior sanction of the Commissioner should be obtained. The learned Judge held that the entire proceedings initiated by such a notice were illegal and that the compliance of the conditions imposed by the proviso formed the essential basis of the jurisdiction of the Income-tax Officer. The argument that the submission of a return in pursuance of such a notice by the assessee amounted to a waiver on the part of the assessee was repelled, the learned Judges holding that even if that could be regarded as a waiver, that could not confer jurisdiction on the Income-tax Officer, if the statutory conditions had not been complied with.

We hold that the initiation afresh of proceedings under section 34 with the issue of the notice on 27th February, 1953 was without jurisdiction and was invalid. That is sufficient to answer this reference in favour of the assessee.

The further question that was argued at length before us raised the issue of limitation. Mr. Ranganathan, learned counsel for the Department, who argued this point with considerable ability and clarity, submitted that the *Second Proviso* to section 34 (3) applied, and that the bar of limitation imposed by section 34 (3) was removed in this case, as the proceedings under section 34 were taken afresh "in pursuance" of the order of the Tribunal. The main contention of the learned counsel for the assessee was that, considering the scope of the appeal disposed of by the Tribunal which related to the assessment year 1945-46, it was beyond the juris-ction of the Tribunal to decide in that appeal whether any portion of the income fell to be taxed in any other assessment year, *e.g.*, 1944-1945. Interesting though the arguments on both sides were, we do not consider it necessary to record any views of ours at this stage on the scope of the *Second Proviso* to section 34 (3) either as it stands now or as it stood before it was amended. As we stated earlier, the reference can be disposed of in favour of the assessee without any need to go into the question of limitation ; no question of limitation can arise for decision when we have decided that the initiation of proceedings was otherwise invalid.

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1. (1956) 30 I.T.R. 439.
2. (1959) 36 I.T.R. 569.
3. (1956) 30 I.T.R. 484.

We answer the question in the negative and in favour of the assessee The assessee will be entitled to his costs. Counsel's fee Rs. 250.

R.M.

Reference answered in favour of the assessee.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

R. Sivaji Rao Saheb Soorvai .. *Appellant**

v.

Akilandathammal and others .. *Respondents.*

Landlord and tenant —Darkhast grants—Validity of grant—Jurisdiction of Civil Court to consider.

It is well settled law that procedural irregularities, if any, occurring in the course of proceedings for grant of Government lands cannot vitiate the grant and it is beyond the competence of Civil Courts to set aside the grant or refuse to recognise its validity. So long as the authorities act within the scope of their powers conferred on them by the rules, it is not open to the Civil Courts to discuss the sufficiency or otherwise of the ground or the regularity of the procedure adopted by them.

Appeal against the Decree of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suit Nos. 105 and 108 of 1957, preferred against the decree of the Court of the District Munsif of Tiruvaiyaru in Original Suit No. 120 of 1956.

T. R. Srinivasan and *T. V. Sadagopachari*, for Appellant.

A. K. Sriraman and *A. Balasubramaniam*, for Respondents.

The Court delivered the following

JUDGMENT.—The State Government of Madras assigned two items of property, 2 acres, 12 cents comprised in R.S. No. 33/2, and 2 acres, 92 cents in R. S. No. 338/2 in the village of Indalur, Tanjore Taluk, belonging to them in favour of Sivaji Rao Saheb Soorvai who claimed to be of the class of persons described as " political sufferers" to whom grants of lands were being made in accordance with the Government Orders issued from time to time. The assisgnment in favour of Sivaji Rao was dated 27th June, 1950. A revenue patta was also issued in his favour on 12th January, 1951. He could not however get possession of the assigned properties as he was met with the opposition of the persons in possession claiming to be lessees from the State Government under the scheme sponsored by the Government called 'The Grow More Food' compaign. Sivaji Rao was therefore compelled to institute the suit, O.S. No. 120 of 1956, on the file of the District Munsif's Court, Tiruvayyaru for recovery of possession of the properties covered by the patta in his favour from four persons who were impleaded as defendants 1 to 4 in the suit. The first defendant disclaimed all interest in the property and submitted that he was an unnecessary party to the suit.

The second defendant claimed to be in possession of plaint item 1 as a lessee from the State Government under the Grow More Food Campaign and submitted that he belonged to a class of persons known as " landless poor " that he had reclaimed the lands by spending a sum of Rs. 1,000 that the Government was bound to have granted an assignment only to him and that the assignment in favour of the plaintiff was not valid. The third defendant submitted that he had no interest in any portion of the suit properties and that he was an unnecessary party to the suit. Defendant 4 claimed to be in possession of plaint item 2 and she also claimed that the land was granted to her by the Government under the Grow More Food Campaign in 1943. She submitted that the land was originally a waste land and that she reclaimed it at an enormous cost as she was made to understand by the Government that the reclaimed lands would be assigned only to her with permanent rights therein. She pleaded that she had spent a sum of Rs. 1,000 for purposes of reclamation. She contested the validity of the grant in favour of the plaintiff and denied his right to evict her.

* S.A. Nos. 37 and 38 of 1959.

6th January, 1961.
(16th Pausa, 1882, Saka).

The learned District Munsif of Tiruvayyaru who tried the suit found that the grant in favour of the plaintiff was valid, that the defendants had no right to continue in possession of the suit properties and granted a decree in favour of the plaintiff for recovery of possession of the suit properties with future mesne profits from the date of the plaint till delivery of possession to be ascertained in separate proceedings under Order 20, rule 12, Civil Procedure Code. The plaintiff's claim for recovery of past mesne profits was negatived. Both the second and the fourth defendants preferred appeals against the judgment and decree of the trial Court to the District Court of West Tanjore at Tanjore which were transferred to the Sub-Court of Kumbakonam for disposal. The appeal of the defendant 4 before the Sub-Court was A.S. No. 105 of 1957 and that of the second defendant was A.S. No. 108 of 1957. The plaintiff preferred memorandum of cross-objections against the decree of the Court below negativing past mesne profits. The learned Subordinate Judge of Kumbakonam held that the assignment in favour of the plaintiff was not valid as it was not in accordance with the rules governing darkhast grants by the State Government, that the contesting defendants 2 and 4 were lawfully in possession as lessees from the State Government and that therefore their possession cannot be disturbed. Accordingly the judgment and decree of the trial Court were set aside and the suit was directed to be dismissed with costs throughout. The cross-objections preferred by the plaintiff also failed necessarily. S.A. No. 37 of 1959 has been preferred by the aggrieved plaintiff in O.S. No. 120 of 1956.

Chinnaswami Kalingarayar, the plaintiff in O.S. No. 213 of 1956 on the file of the District Munsif's Court, Tiruvayyaru, was another political sufferer in whose favour the State Government made a grant of an extent of 4 acres of land in R.S. No. 341/2 in Indalur village, Tanjore taluk. The grant was made on 6th January, 1951. That item of property was in the possession of two individuals, Akhilandathammal and her son Ramalingam who claimed to be in possession as lessees from the State Government under the Grow More Food Campaign. Chinnaswami the grantee could not obtain possession of the properties and he therefore instituted the suit for recovery of possession impleading Akhilandathammal and Ramalingam as defendants 1 and 2. The questions raised in this suit were identical with the questions raised in O.S. No. 120 of 1956 already referred to. The learned District Munsif upheld the plaintiff's claim and granted a decree for recovery of possession in his favour from the first defendant. His claim for past mesne profits was negatived but he was granted future profits to be ascertained on separate application under Order 20, rule 12, Civil Procedure Code. The first defendant preferred an appeal to the District Court of West Tanjore against the said judgment, and decree which was eventually transferred to the Sub-Court at Kumbakonam and taken on file as A.S. No. 106 of 1957. The learned Subordinate Judge reversed the judgment and decree of the trial Court, negatived the plaintiff's claim and non-suited the plaintiff. The memorandum of cross-objections preferred by the plaintiff in respect of past mesne profits also failed. S.A. No. 38 of 1959 has been preferred by the aggrieved plaintiff in that suit.

Both these second appeals were heard together. The only question that arises for consideration in both the appeals is whether the plaintiff in the two suits have a valid title to the suit properties to evict the contesting defendants from the suit properties. The lands admittedly belonged to the State Government. The contesting defendants claimed to be in possession as lessees from the State Government. Their case is that they were inducted as tenants in the lands by the policy inaugurated by the Government under a scheme known as " Grow More Food ". They were however unable to produce any lease deed in their favour or any extract from the lease register maintained by the Government. The learned District Munsif was of the opinion that the defendants failed to prove that they were tenants holding under the Government. But the lower appellate Court disagreed with that finding, of the trial Court and held that there was evidence on record to show that these defendants must have come into possession of the suit lands only as lessees or tenants. Even according to the defendants the lands were leased out to them only in 1943

for a period of five years only. That period undoubtedly expired in 1948. Thereafter they were merely in the position, if at all, of tenants holding over of the demised properties. It is obvious that the defendants had no proprietary interest in the suit properties of any kind on the date when the State Government assigned the properties in favour of the plaintiffs in the two suits.

The Courts below have proceeded on the footing that the grant in favour of the plaintiffs was made by the State Government under the provisions of Board Standing Order 15. The learned counsel for the appellants contended that the grant in favour of political sufferers is governed by a separate set of Government's Orders, and that the Board Standing Order cannot govern such grants. There are variations between the terms of the Government Order issued regarding grant in favour of the political sufferers and the provisions of Board Standing Order 15. G.O. No. 1523, dated 11th June, 1949, clause 10 reads as follows :

> " Such of the provisions of the Board Standing Order 15, etc., which are not in conflict with the orders in this Government Order will continue to apply. The Board is requested to issue necessary amendments to Board Standing Order 15, etc., in the light of the orders in this Government Order."

I do not think it is necessary for me to decide in this case the question whether the validity of the grant in favour of a political sufferer or Thyagi should be judged by the terms of the special Government Order or by the terms of Board Standing Order 15, as I am of opinion that the grant in favour of the plaintiffs in the two suits is not void and that in any event it cannot be challenged in a civil Court.

Board Standing Order 15 sets out an elaborate procedure to be adopted by the Revenue department in the matter of making darkhast grants. Grants can be made by the Tahsildar or the Divisional Officer or the Collector according to the circumstances mentioned in the Board Standing Order. From every original decision passed by the Tahsildar, Divisional Officer or the Collector an appeal is provided from the Tahsildar to the Divisional Officer, or from the Divisional Officer to the Collector or from the Collector to the Board. Clause 18 of Board Standing Order 15 provides that the order of the authority making the assignment, if no appeal is presented, or of the appellate authority if an appeal is presented is final. If the Collector is satisfied within three years of the original or the appellate decision that there has been material irregularity in the procedure or that the decision was grossly inequitable or that it exceeded the powers of the officer who passed it or that it was passed under a mistake of fact or owing to fraud or misrepresentation, he may in the case of an order passed by an officer subordinate to him set aside, cancel or in any way modify the decision. Similar powers are given to the Board of Revenue to set aside, cancel or modify the decision of any officer subordinate to it.

The learned Subordinate Judge has adverted to certain alleged irregularities in the matter of the grant made by the State Government in favour of the plaintiffs in both the suits. It is stated that under rule 4 of Board Standing Order 15, no application can be considered except for land which is actually at the time unoccupied or has been occupied without the proper sanction and that therefore the application of the political sufferers in the present case ought not to have been entertained. This is one irregularity which according to the lower appellate Court vitiates the grant. It is next pointed out that there is no proof that the formalities prescribed in the Board Standing Order for referring the matter, to the Village Officer for report, and giving necessary publicity by beat of tom tom in the village choultry, were gone through. The learned Subordinate Judge in paragraph 12 of his judgment has observed thus :

> " A perusal of the rules relating to dharkhast would indicate that a duty is cast on the revenue officers to satisfy the conditions prescribed therein before the assignments in question are made. The duties cast upon them consist of the power to make an enquiry, the power to make the publicity and ultimately the power to issue the necessary orders. The exercise of these powers depends upon the observance of the rules, and if they are not substantially complied with, it is the duty of the Court to see that these powers are exercised in conformity with the rules."

I have no hesitation in holding that the learned Subordinate Judge has totally misconceived the jurisdiction of the civil Court to interfere with darkhast grant made

by the State Government in their administrative capacity. It is now settled law that the procedural irregularities, if any, ocurring in the course of proceedings for grant of Government lands cannot vitiate the grant and that it is beyond the competence of civil Court either to set aside such grant or to refuse to recognise its validity.

In *Periaroyalu Reddi* v. *Royalu Reddi*[1], a grant was made by the revenue authorities in favour of an individual. A patta was also issued in his favour. Another individual had objected to the grant but the objection was overruled. The successful grantee filed the suit for declaration of his title and for revovery of possession of the land. The trial Court passed a decree in his favour as prayed for but that decree was upset on appeal by the District Judge who held that dharkast was vitiated by reason of non-compliance with Board Standing Order 30, section 5 which required that the application such as that of the plaintiff should be proclaimed in the village by beat of tom tom. The District Judge was of opinion that these formalities not having been complied with the plaintiff had obtained no title to the land. A Division Bench of this Court set aside the judgment of the District Court and held that the plaintiff's title was not invalidated by reason of the non-compliance with the dharkast rules. At page 435 their Lordships Muttuswami Iyer and Best, JJ., observed thus :—

> "Dharkast rules are departmental and if they are infringed, the remedy for such infringement is also departmental. Irregularities in observing those rules constitute no valid ground of interference by the civil Courts with a grant of land made by the Government. The land in dispute is entered in the pymash account as waste and as such it is at the disposal of Government. It is not competent to the Civil Courts to set aside a grant made by an officer competent to make the grant."

In *Secretary of State* v. *Kasturi Reddi*[2], Bashyam Iyengar, J. delivering the judgment of the Bench dealing with the question of the civil Court's jurisdiction in respect of dharkast grants observed as follows :

> "The only portion of the rules with which the Courts need concern themselves are those which define the officers competent to make assignments of land, the extent of their authority including the description of lands which the said officers may respectively dispose of under the dharkhast rules and the degree of control by a higher grade officer to which the exercise of such authority is subject ; and so far as the present case is concerned, there can be no doubt that the officer under whose grant the respondent claims was competent to make the grant and the land which he granted, i.e., assessed waste land was of a description which he was authorised to grant on dharkhast. The bulk of the dharkast rules, which are in the nature of instructions issued by Government to the various officers concerned, as to the principles which should guide them in entertaining or rejecting applications for grant of various descriptions of land and determining to which of several competing applicants the grant should be made, if at all and the procedure to be adopted by them do not concern the civil Courts."

In *Muthu Veera Vandayan* v. *Secretary of State*[3], the facts of the case were as set out in the headnote as follows : *A* applied to the Tahsildar under rule IV of the dharkast rules for a grant of land. The Tahsildar made the grant under rule VII on 10th May, 1897, and the grant stated that it was subject to the result of any appeal that may be preferred. On 15th July, 1897 and on 2nd November, 1897 two appeals were preferred to the Deputy Collector against the grant. On 15th June, 1898, the Deputy Collector issued a patta to *A* in pursuance if the grant. The appeals were heard on 28th June, 1899, after notice to *A* and the grant of the Tahsildar was set aside on the ground that the notice under rule V was not duly published. *A* appealed to the Collector and to the Board of Revenue and his appeals were dismissed. *A* instituted the suit out of which the appeal arose for a declaration that the lands had become his property and that the Deputy Collector's order cancelling the grant was null and void or in the alternative for a decree directing the defendant to pay the kist paid by *A* and the cost of improvement effected by him. The Court of first instance granted a declaration as prayed for. On appeal the Subordinate Judge holding that it was not open to the Civil Court to question the propriety of the cancellation passed by the Deputy Collector modified the decree by granting the alternative remedy in respect of cist and improvement. On appeal to the High

1. (1894) I.L.R. 18 Mad. 434.
2. (1902) 12 M.L.J. 453 : I.L.R. 26 Mad. 268.
3. (1906) I.L.R. 29 Mad. 461.

Court White, C.J. held that it was not open to a civil Court to cancel a patta because some of the formalities of the dharkast rules have not been complied with. It may however set aside an order of an appellate Revenue Tribunal which allowed an appeal against the grant by the revenue official on the ground of irregularity of procedure if it is of opinion that there is no evidence of irregularity although it will not be open to a civil Court to interfere if the Tahsildar declined to make the grant due to irregularity of procedure. But Benson, J. held that it was not open to the civil Courts to discuss the sufficiency or otherwise of the grounds on which the dharkast authorities whether original or appellate grant or refuse to grant Government land to parties applying to them so long as those authorities act within the scope of the authority conferred on them by the rules. The following observation of Benson, J. can be quoted as it succinctly sets out the scope of the jurisdiction of the civil Courts in respect of dharkast grant (page 470) :

"But in my judgment it is not open to the civil Courts to discuss the sufficiency or otherwise of the grounds on which the Dharkast authorities—Whether original or appellate—grant, or refuse to grant Government lands to parties applying for them, so long as those authorities act within the scope of the authority conferred on them by the rules.

To do so would, in effect, be equivalent to an assumption by the Civil Courts of the appellate jurisdiction in all matters connected with the administration of the Dharkast rules. Those rules provide for the procedure to be followed in dealing with applications for State lands, and they provide for the exercise of appellate and revisional powers by certain authorities, and it is not open to the Civil Courts to assume to themselves the appellate powers thus conferred on other authorities. It would of course be different if the Revenue authorities purporting to act under the Dharkast rules, acted outside the scope of their authority, but that is not the present case."

By reason of this difference of opinion the case again came up before a Bench of three Judges, consisting of White, C.J., Benson and Miller, JJ. That decision is *Muthuveera Vandayan* v. *The Secretary of State for India*[1]. Miller, J. agreed with the judgment of Benson, J. Dealing with this question of jurisdiction the learned Judge observed thus :

"The civil Courts can enquire whether the officers of the Government are acting within the scope of their authority, and nothing more.............

I entirely agree with what is pointed out in the latter case, that any other rule will lead to confusion, and the whole body of darkhast rules will become unworkable in the Civil Courts."

It is really unnecessary to cite further cases on the subject. Irregularities caused by deviation from the rules of procedure framed by the State Government in the matter of dharkast grants can be examined and corrected only by the authorities to whom the task is entrusted. It will be beyond the province of the jurisdiction of civil Court to cure the ills caused by administrative lapses in cases where no civil rights of the parties are involved. If the State Government can make a grant of its land to *A* or *B* the fact that the grant is made to one of them alone, be it not strictly in conformity with the rules framed for the grant cannot give a cause of action to the disappointed rival to obtain redress in a civil Court.

Learned counsel for the respondents relied on a decision of a Full Bench of this Court in *Nagrathnammal* v. *Ibrahim Sahib*[2]. The question that arose for decision before the Full Bench was whether the Board of Revenue had power to interfere with an order made by the District Collector under section 10 (5) of Madras Act III of 1895 appointing a deputy to a post registered in the name of a minor. The Full Bench of this Court held that holders of office governed by the statute cannot in relation to their offices be dealt with except in the manner provided by the relevant statute and that neither the Revenue Divisional Officer nor the District Collector nor the Board of Revenue can deal with them except in the manner permitted by the statute. Though the decision of that case has no bearing on the present case the following observations of Balakrishna Ayyar, J. were relied upon :

"But even with reference to matters not governed by statutory provisions of rules but governed only by the Standing Orders of the Board of Revenue, the passage we have extracted above is liable to be misunderstood. We are unable to subscribe to the view that where a rule already exists and

1. (1907) I.L.R. 30 Mad. 270.
2. (1955) 2 M.L.J. 49 : I.L.R. (1955) Mad. 460 (F.B.).

provides for any specific matter, still when an individual case comes up before the Board, it is open to the Board notwithstanding the existence of that rule, to decide that case in any manner it thinks fit, even in contravention of the existing rule. In other words, the Board cannot ingore the existing rule by treating the order made in that particular case as an amendment of the rule......We wish to emphasise the position, that the decision in any given case must be in accordance with the rules in force on the date of the decision. Otherwise the difference between what may be by way of analogy called legislative (rule making functions of the Board) and its judicial and quasi-judicial function would be blurred, and the door thrown open to charges of arbitrariness."

This observation was quoted by learned counsel for the respondents in support of the contention that any violation by the departmental authorities of a Standing Order under the Board Standing Order is an irregularity which it will be open to the civil Court to correct and set aside.

I am unable to accept this contention. It must be noted that the present suits are not suits for cancellation of the Government order making the dharkast grant. The State Government is not a party to these suits. The civil Court is not therefore called upon to set aside a Government order on the ground that it is vitiated by illegality due to non-compliance with the rule as framed under the Board Standing Order. It must be presumed that the grants will subsist and continue to subsist till they are set aside by a competent authority. The defendants in these suits cannot be permitted to challenge the grant merely by way of a defence raised in an action for ejectment. I am of opinion that the observation of Balakrishna Ayyar, J. has no application to the present case.

The ground on which the learned Subrodinate Judge set aside the judgments and decrees of the trial Court is erroneous in law and cannot be sustained. In the result, the second appeals are allowed, the judgments and decrees of the learned Subordinate Judge are set aside and those of the trial Court are restored. The parties will bear their respective costs throughout. No leave.

R.M. *Appeals allowed.*

(FULL BENCH)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN, MR. JUSTICE SRINIVASAN AND MR. JUSTICE VENKATADRI.

Chellammal .. *Appellant**

v.

Abdul Gaffoor Sahib and another .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938)—*Section* 13—*Debts incurred after the commencement of the Act—Re-opening of payments made by a debtor in accordance with the contract and appropriated towards interest—If permissible.*

Section 13 of the Madras Agriculturists Relief Act (IV of 1938) does not render the payment of, or a contract to pay, interest on a debt incurred after the commencement of the Act at a rate higher than that prescribed therein, illegal or automatic discharge of interest stipulated at a rate higher than the one prescribed therein. Such excess interest is only made irrecoverable if the creditor seeks to enforce the debt in a Court of law. The logical result of the decision in *S.M. Taraganar* v. *Sankarapandia Mudaliar*, (1958) 2 M.L.J. 568 (F.B.) is that a debtor cannot demand re-opening of the transaction and re-calculation of the interest on the basis of the earlier bond. It must necessarily follow that in cases where he has in fact paid the interest at the contract rate and discharged his obligations in respect of interest, he cannot have the transaction re-opened, and the amount paid as interest at the contract rate re-appropriated in a different manner.

Decision in *Sreenivasa Rao* v. *Abdul Rahim Sahib*, (1956) 2 M.L.J. 189 is inconsistent with the principle laid down in *S.M. Taraganar* v. *Sankarapandia Mudaliar*, (1958) 2 M.L.J. 568 (F.B.), and is no longer good law.

Section 13 is different in scope from sections 8 and 9. The words "Interest due" in the context must necessarily mean interest which is still payable, something to be paid in future, as distinguished from something which has happened in the past, something to be recovered by legal process.

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* S.A. No. 1048 of 1957. and L.P.A. No. 55 of 1959. 21st April, 1961. (1st Vaisakha, 1883, Saka.).

In re *Moss* Ex parte *Hallet*, L.R. (1905) 2 K.B. 307, referred to.

Nainamull v. *Subba Rao*, (1957) 2 An. W.R. 53 (F.B.), not followed.

Section 72 of the Contract Act has no application. Section 13 of Act IV of 1938 only denies to the creditor the right to recover through Court interest at the contract rate if it exceeded the rate provided in the section. The contract is not alleged to be nor is the payment at the higher rate illegal. There can be no question of any mistake in law in regard to such a payment voluntarily made by the debtor.

Chandrasekharan Pillai v. *Thangavelu Pillai*, (1961) 1 M.L.J. 172 and *Subbaraya Chettiar* v. *Vythianathan Mudaliar*, (1961) 1 M.L.J. 240, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore, in A.S. No. 67 of 1957 preferred against the decree of the Court of the District Munsif of Kallakurichi in O.S. No. 254 of 1955.

T. A. Ramaswamy Reddiar, for Appellant and

V. C. Veeraraghavan , for Respondent in *S. A. No.* 1048 *of* 1957:

D. Ramaswami Iyengar and *T. R. Mani*, for Appellants and

K. Vaitheeswaran, for Respondents in *L. P. A. No.* 55 *of* 1959 :

The Judgment of the Court was delivered by

Srinivasan, J.—The correctness of the decision in *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1], is the question that is raised in these two appeals. We shall briefly set out the facts leading thereto.

S.A. No. 1048 of 1957 arises out of a suit on a mortgage executed on 26th October, 1949. The principal sum was Rs. 2,000 and the contract rate of interest 18 per cent. A sum of Rs. 900 had been paid by the mortgagors towards interest up to 1st April, 1952. It has been duly appropriated. In the suit, the mortgagors contended that the payment of Rs. 900 should be credited towards the principal. Relying on *Ramalakshmi* v. *Gopalakrishna Rao*[2], the trial Court rejected this contention ; but in appeal, the learned Subordinate Judge held that *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1], applied to the facts of the case. He accordingly re-opened the appropriation already made. By the time the matter came up in second appeal before Somasundaram, J., the decision in *S. M. Taraganar* v. *Sankarapandia Mudaliar*[3], had been rendered by a Full Bench of this Court. The learned Judge was inclined to take the view that the Full Bench decision in effect overruled the decision in *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1], and directed the papers to be placed before the Honourable the Chief Justice for reference to a Full Bench.

L.P.A. No. 55 of 1959 arises out of an application O.P. No. 77 of 1955 under section 19-A of the Madras Agriculturists Debt Relief Act. That dealt with a mortgage executed on 24th May, 1947, carrying interest at 12 per cent per annum. The petitioners mortgagors claimed relief under the Act and contended that though they had paid certain amounts towards interest, these appropriations should now be re-opened and that the payments made by them should be applied towards the principal and interest thereon calculated at 6¼ per cent until 28th July, 1947 and at 5½ per cent thereafter. The learned Subordinate Judge accepted this contention in view of the decision in *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1]. This decision was the subject-matter of an appeal A.A.O. No. 2 of 1957 before Ganapatia Pillai, J. The learned Judge interpreted *S. M. Taraganar* v. *Sankarapandia Mudaliar*[3], to mean that this mode of reappropriation would not be applicable to a case governed by section 13 of Act IV of 1938. Though the learned Judge does not in specific terms say so, he appears to have held that the Full Bench decision in *S. M. Taraganar* v. *Sankarapandia Mudaliar*[3] overruled the decision in *Sreenivasa Rao* v. *Abdul Rahim*

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1. (1956) 2 M.L.J. 189.
2. (1944) 2 M.L.J. 285.
3. (1958) 2 M.L.J. 568 (F.B.).
4. (1949) 2 M.L.J. 659 (P.C.).

Sahib[1]. The appeal was accordingly allowed. In the Letters Patent Appeal the Bench before whom it came up for hearing made an order that the papers should be placed before the honourable the Chief Justice for disposal of the appeal by the Full Bench in order that the correctness of the decision in *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1], may be finally settled.

It will be noticed from what has been stated above that the debts in the above two cases came into existence after the commencement of Act IV of 1938. It is common ground that the scaling down of such debts is dealt with by section 13 of the Act, and the question that accordingly arises is as to the correct mode of scaling down to be adopted in such cases. In the light of the decision in *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1], the question that pointedly arises is whether in the case of a debt incurred after the commencement of the Act, it is open to the Court to re-open the appropriations made towards the interest, such appropriations having been made with the consent of the debtor, and to award interest only at the rates specified in section 13 of the Act from the date of the commencement of the debt. We may state at the outset that besides the line of cases rendered by the Madras High Court dealing with this point, there are a few recent decisions of the Andhra Pradesh High Court which have followed the principle laid down in *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1]. Not only is there a conflict between a decision of a Bench of this Court and a later Full Bench decision which however, dealt with the point only indirectly, but we have also to consider a few decisions of the High Court of Andhra Pradesh directly bearing on the point which differ from the Full Bench decision of this Court in *S. M. Taraganar* v. *Sankarapandia Mudaliar*[2].

The earliest decision directly bearing on the point is *Ramalakshmi* v. *Gopalakrishna Rao*[3]. That was also a case where the debt was incurred after the commencement of Madras Act IV of 1938. The debt carried interest at 12 per cent and there was a series of payments of interest expressly apropriated by endorsements so that all the interest up to the 11th August, 1941, had been paid at the contract rate. In a suit on the note for the principal together with interest at the contract rate,the trial Court scaled down the debt calculating the total amount of principal and interest at the statutory rate of 6¼ per cent and deducting therefrom all the payments made. It was held by this Court that such a mode of re-appropriation was not permitted by the Act, there being no provision under section 13 for the scaling down of interest already paid and appropriated. The learned Judges besides basing their decision on this view of the scope of section 13 of the Act went on to say that even if there had been an overpayment of interest, such payment had been made under a mistake of law which could not be recovered through Courts.

In *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1], also the case of a debt which was incurred after the commencement of Act IV of 1938 was in question. The learned Judges examined the ratio of the decision in *Ramalakshmi* v. *Gopalakrishna Rao*[3], and took the view that subsequent to the decision of the Privy Council in *Shiba Prasad Singh* v. *Srish Chandra*[4], the foundation on which *Ramalakshmi* v. *Gopalakrishna Rao*[3], was rested was somehwat shaky. In the Privy Council decision it was decided that section 72 of the Indian Contract Act did not exclude payments made under a mistake of law. While it may be conceded that to the extent to which the learned Judges who decided *Ramalakshmi* v. *Gopalakrishna Rao*[3], depended upon the then accepted position in law that payments made under a mistake in law could not be recovered, that decision was not rested upon that ground alone. The view that they took about the scope of section 13 of Act IV of 1938 was not specifically examined by the learned Judges who decided *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1]. We do not find anywhere in this judgment an examination of the scope of this provision of the Act.

In *S. M. Taraganar* v. *Sankarapandia Mudaliar*[2], the question arose whether it was permissi' le under section 13 of the Act to re-open debts incurred after the Act

1. (1956) 2 M.L.J. 189.
2. (1958) 2 M.L.J. 568 (F.B.).
3. (1944) 2 M.L.J. 285.
4. (1949) 2 M.L.J. 259 (P.C.).

What happened in that case was that there was a series of borrowings at 10½ per cent. per annum. At the end of each year of account, interest at the contract rate was debited against the borrower. There were periodical settlements of account at which the amount due to the creditor was ascertained, and an acknowledgment as to the correctness of the amount and a promise to pay it with future interest then stipulated were recorded. These fresh agreements entered into on each settlement of account were in the form of promissory notes and stamped as such. On the last of such settlements of account which was on the 17th August, 1951, the suit was laid. The claim to relief under Act IV of 1938 was advanced, the debtors contending that the entire account should be re-opened and that they should not be made liable to pay any interest in excess of 5½ per cent. per annum. It may be mentioned that the borrowing commenced in December, 1943, so that the debt was one which had been incurred after the commencement of the Act. The contention was advanced that the re-opening of the transaction would be merely giving effect to the intention of the Legislature which was enacted to protect the agriculturist debtor against his own contract. The learned Judges repelled this contention and proceeded to examine the sections. They observed that:

" where an old liability is merged or renewed by a fresh contract, the old debt is extinguished and could no longer be termed a debt unless the later debt has under the law been allowed to be ignored and the transanction re-opened. The Legislature, when it intends that particular debts should be traced back to their origin, provides for such re-opening of debts specifically (*vide* sections 8 and 9)."

Proceeding further, they observed :

" The Act does not render the payment of or a contract to pay interest on a debt at a rate higher than that prescribed for each of the various categories illegal. Nor is there any question of public policy involved when a higher rate of interest on a loan is agreed to by an agriculturist. Under the provisions of the Act, relief to agriculturist debtors was granted by the Act itself discharging the whole or a portion of the interest on debts incurred prior to the Act. Section 8 discharged all outstanding interest on a debt incurred prior to 1st October, 1932, while in regard to debts incurred after that date but before the Act, section 9 discharged that portion of the interest which was above simple interest at 5 per cent per annum. Future interest on those debts were regulated by section 12: Section 13 dealt with debts incurred after the Act. Under that section there is no provision for any statutory or automatic discharge of interest stipulated at a rate higher than that prescribed therein ; such excess interest was only made irrecoverable if the creditor sought to enforce the debt in a Court of law. There being thus neither a prohibition against a stipulation for payment nor an automatic discharge of higher rates of interest agreed to be paid by an agriculturist debtor, it cannot be said that when a creditor with the assent of his debtor added to the principal loan the interest accrued in terms of the contract, and the debtor entered into a fresh contract treating the consolidated amount as principal for the fresh loan, there would be anything illegal or even a failure of consideration in regard to the new loan. Such a new loan would constitute a debt incurred on the date of renewal and if a suit is based on that debt, the provisions of section 13 could be attracted to that debt and not to the earlier debts of which it was a renewal or substitution. Under the ordinary law where parties enter into a new contract in substitution of an earlier one, the later contract alone would govern the rights of the parties. The Court would itself have no power to go behind that contract except in cases where the later contract fails for some reason known to law or where a statute gives an express power to reopen the same. Sections 8 and 9 of Act IV of 1938 confer jurisdiction on Courts to re-open a transaction in cases of renewals of debts incurred prior to the Act. But section 13 confers no such power and *prima facie* the scaling down of interest contemplated by it could only be in relation to the debt sued on...."

The decision was accordingly to the effect that it was not open to the Court to go behind a particular transaction which was the subject-matter of the claim before Court.

The logical result of this decision would appear to be that, it is not open to the debtor to demand that the entire series of transactions should be re-opened in a case where interest computed at the contract rate had been included in a subsequent promissory note, that is to say, where the debtor bad merely made a promise to pay interest at that rate, it would equally be not open to him to ask for re-appropriation in a case where he had paid interest at the contract rate and agreed to its appropriation towards the interest due on the bond. The subsequent execution of a later promissory note or bond for a sum inclusive of the principal and the outstanding interest on an earlier bond at the contract rate amounts only to a promise to pay in future all interest that had accrued at the contract rate on the original sum advanced. If, according to the Full Bench decision referred to, the debtor

cannot demand re-opening of the transaction and re-calulcation of the interest on the earlier bond, it must necessarily follow that in a case where he has in fact paid the interest at the contract rate and discharged his obligations in respect of interest, he cannot equally have the transaction re-opened, and the amount paid as interest at the contract rate re-appropriated in a different manner. As the learned Judges pointed out, Act IV of 1938 did not render the contract to pay interest at any figure higher than that prescribed, if any, illegal. Nor does section 13 of the Act give any power to the Court to go behind the contract in the manner in which such power has been expressly granted under sections 8 and 9. It should therefore follow that the decision in *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1], is totally inconsistent with the principle laid down in *S. M. Taraganar* v. *Sankarapandia Mudaliar*[2].

On behalf of the respondents, it has been claimed that in the decision in *S. M. Taraganar* v. *Sankarapandia Mudaliar*[2], the question of re-appropriation of interest did not arise. While we agree that it did not directly arise, the principle of that decision cannot possibly be explained in any other manner. It is contended, however, that the policy of the Act was that the debtor should be given benefit, and any interpretation which curtails the scope of section 13 of the Act would be detrimental to the interests of the agriculturist debtor and would accordingly be out of tune with the policy of the Act. Reliance has also been placed upon a decision of the Full Bench of the Andhra Pradesh High Court in *Nainamul* v. *Subba Rao*[3], where the Full Bench came to the conclusion that even in a case coming under section 13 of the Act, appropriation towards interest made at the contract rate is liable to be re-opened and the payments adjusted differently. Among other reasons given by the learned Judges for reaching this conclusion, one was that any other view would not give effect to the intention of the statute. Though we are not bound by this decision, in view of the reliance placed upon it on behalf of the debtors, it is necessary to examine the reasoning which led to this conclusion.

The learned Judges set out the relevant provisions of sections 7, 8, 9, 12 and 13. They no doubt pointed out that the Act provides for relief of indebtedness, the extent of the relief varying with the date of the indebtedness. Under the Act, the debts in respect of which reliefs have been differently provided are debts incurred prior to the 1st October, 1932, covered by section 8 of the Act, debts incurred on and after the 1st October, 1932, and before the commencement of the Act, covered by section 9 and debts incurred after the commencement of the Act which are covered by section 13. After noting that the extent of relief varies with the date of indebtedness, they proceeded to observe :

> " It is therefore clear that though the extent of the relief varies, the nature of the relief is the same so far as interest is concerned. It is not relevant for the present enquiry to notice the other differences in the nature and the extent of the relief provided by the Act between three debts. Bearing in mind, therefore, the object of the Act, *viz.*, the reduction of interest on debts incurred by agriculturists, we shall proceed to scrutinise the respective contentions of the parties. "

It seems to us however that while the learned Judges were justified, if we may say so with respect, in relying upon the intention of the statute to provide relief to indebted agriculturit debtors as the underlying policy of the Act, it is undoubtedly the equally declared policy of the Act to classify the various classes of debts and to measure the relief to be granted in respect of those classes of debts differently. That appears to be no less a policy which is a prominent feature of the Act which to our minds cannot be ignored.

The Full Bench of the Andhra Pradesh High Court was clearly aware of the fact that section 13 in terms did not arm the Court with any power to re-open transactions. They observed, after dealing with the differences between sections 8, 9, and 13 :

> " Why then did the Legislature make express provision in section 9 for re-opening the appropriations made whereas no such provision was made in section 13 but left us to infer from the cryptic

1. (1956) 2 M.L.J. 189.
2. (1958) 2 M.L.J. 568 (F.B.).
3. (1957) 2 An. W.R. 53 : A.I.R. 1957 A.P. 546 (F.B.).

words used therein ? The only answer I can find, though not satisfactory, is that the scaling down process under section 9 is more complicated than that under section 13, and, therefore, the provision was drafted with better detail.

* * * * * * *

But section 13 affects future transactions entered into by the parties presumably with knowledge of the provisions of the Act. A single provision like section 13, therefore, was considered sufficient to give the limited relief prescribed thereunder. Be that as it may, the fact that in one provision the Legislature gives a detailed treatment to a subject is no ground for ignoring the express provisions of another section, if the scheme of scaling down described in the former gives effect to the expressed intention of the Legislature in the latter."

It will be apparent therefore that while the learned Judges were fully conscious of the fact that section 13 did not in terms give a power similar in its amplitude to that contained in sections 8 and 9 they purported to infer the existence of such a power; they did so, as far as we can see, relying not upon any specific words found in the section but on what they held to be the intention of the Legislature. As we have pointed out, in the scheme of the Act, the feature that is brought into sharp relief is the equally declared policy of the statute to differentiate between the different classes of debts according to the date of indebtedness. We cannot ignore this feature any more than we can ignore the policy underlying the Act, *viz.*, that it is to give benefit to indebted agriculturist.

The same arguments which seem to have prevailed with the Full Bench of the Andhra Pradesh High Court have been pressed before us for our acceptance. It is argued that in the application of section 13 of the Act, the Court is bound to scale down all interest due on any debt incurred by an agriculturist after the commencement of the Act. Emphasis has been laid down upon the word 'all' and we are invited to interpret it, as did the Andhra Pradesh High Court, to mean the totality of the interest from the date on which the debt was incurred, notwithstanding any part of that interest might have been paid willingly by the debtor before the matter came to Court by way of a proceeding for recovery of the debt. The learned Chief Justice of the Andhra Pradesh High Court was of the opinion, that the use of the word 'all' was significant and must be taken to mean the entire interest which the debt had earned. As he pointed out, the word interest used in section 13 is qualified by two words 'all' and 'due'. He was also inclined to accept the meaning of the word 'due' as 'payable' as not being inappropriate in the context. Nevertheless, the conclusion was that the expression 'all interest due' must be taken to mean the totality of the interest earned by the debt from the date it was incurred notwithstanding that any part of it might have been discharged.

We are not inclined to agree with the view that the expression 'all' has any particular or precise significance in the context. In section 8 (1) also it is provided that "all interest outstanding on the 1st October, 1937" shall be deemed to be discharged. The content of this sub-section would not alter in the slightest degree if the word 'all' were dropped from the section. "Interest outstanding on the 1st October, 1937, shall be deemed to be discharged" cannot possibly mean anything different from "all interest outstanding, etc." In the body of section 9 again, we find "credit shall be given to all sums paid towards interest." In these two instances also, the word 'all' seems to have no particular significance attached to it. On the other hand, we find in section 9-A, which contains special provisions in respect of usufructuary mortgages, the word 'all' used in the following context: "all other sums payable to the mortgagee by the mortgagor in his capacity as such . . . ." occurring in section 9-A (3) (iii), and in sub-section 4 (iv) of this section 9-A, the word "all" is obviously used to indicate the various sums which the mortgagor might be bound to pay to the mortgagee. But in the expressions "all interest due and all interest outstanding on the 1st October, 1937", it is impossible to attach any particular meaning to the word "all". The redundency of this word 'all' is particularly noticeable in the expression 'all interest outstanding on the 1st October, 1937', for when any interest is "outstanding" on a particular date, it is obviously the totality of the interest that would be so

outstanding and the qualifying word ' all ' in this instance does not appear to add anything to the meaning of the remaining words. We are unable to agree with the learned Judges of the Andhra Pradesh High Court in holding that all interest due in the context of section 13 means the amount of total interest which the debt earned since its inception.

Learned counsel for the creditors invited our attention to the definition of " interest " in section 3 (iii) (*a*) of the Act which runs : " ' Interest ' means any amount or other thing paid or payable. . . . ." According to the learned counsel, in interpreting section 13, the word ' interest ' appearing therein should be given this extended meaning, that is to say, that interest paid should also be taken note of by the Court in scaling down the interest. We are not satisfied that this argument is well founded. The word ' interest ' is qualified by the further expression ' due ' and in the context of the provision, it seems to us that it is only interest that is still payable that is brought within the scope of section 13. The expression ' interest ' has been defined in an inclusive manner to mean any amount paid only for the purpose of sections 8 and 9 which provide for the re-appropriation of interest already paid. In the light of the 'pronounced differences between the modes of dealing with debts covered by sections 8, 9 and 13 of the Act, the words ' interest due ' appearing in section 13 must necessarily be interpreted in the context in which they appear : to do otherwise would destroy the differences between debts whatever be the date of their origin. We are strongly of the view that that was not the intention of the statute.

A Division Bench of the Andhra Pradesh High Court, to which Subba Rao, C.J., was a party, decided in *Pundarikakshudu* v. *Venkatakrishna*[1], that section 13 of the Act does not enable a debtor to trace back his debt to the original debt incurred after the Act came into force. This decision was referred to and approved by the Full Bench of the Madras High Court which decided *S. M. Taraganar* v. *Sankarapandia Mudaliar*[2]. In the Full Bench decision of the Andhra Pradesh High Court *Nainamul* v. *Subba Rao*[3], to which we have referred above, *Pundarikakshudu* v. *Venkatakrishna*[1], was referred to in the referring judgment but the implications of that decision were not examined in the Full Bench judgment. We must, however, mention that in another decision of the Andhra Pradesh High Court *Punyavatamma* v. *Satyanarayana*[4], a Division Bench consisting of Chandra Reddi, C.J. and Narasimham, J., had to examine whether the decision in *Pundarikakshudu* v. *Venkatakrishna*[1], could still be regarded as embodying the correct rule of law in view of the Full Bench decision in *Nainamul* v. *Subba Rao*[3]. This Bench came to the conclusion that the decision in *Pundarikakshudu* v. *Venkatakrishna*[1], could not be reconciled with the principle laid down in the Full Bench decision.

One other aspect of the matter which we must refer to at some length is the correct connotation of the expression ' interest due '. We are not prepared to accept the interpretation of this expression given to it by the Andhra Pradesh High Court as the interest which the parties have contracted to pay. The word ' due ' has undoubtedly a sense of something to be performed in the future as distinct from something which has happened in the past. In In re *Moss* ex parte *Hallet*,[5] the proper meaning of this expression came up for consideration, and Darling, J., observed.:

" The covenant of the appellant was to pay interest on the principal sum ' so long after the day fixed for payment as any principal money remains due under these presents '. It is clear, therefore, that if no principal money remains due, the appellant is under no liability to pay interest to Cooke, and the question therefore is whether after the bankruptcy any principal money did in fact remain due. It is admitted that no action would lie against the bankrupt, but it is argued that the principal money nevertheless remains due even after he has obtained his discharge. Due from whom? It could only be due from the bankrupt, and *ex hypothesi* he has been discharged from all liability to pay the principal money. In my opinion, money can only be said to be due in a legal sense when it can be recovered in an action, and it is impossible to say that there

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1. (1957) 1 An. W.R. 47 : A.I.R. 1957 A.P. 204.
2. (1958) 2 M.L.J. 568 (F.B.).
3. (1957) 2 An. W.R. 53 : A.I.R. 1957 A.P. 546 (F.B.).
4. (1960) 1 An. W.R. 336.
5. L.R. (1905) 2 K.B. 307.

can be anything due under this security when no money can be recovered by any legal process. If there is no principal money due, it follows that there is no intereest payable."

If therefore the meaning of the word 'due' is that it is something which can be recovered by legal process, that is obviously not the case here in relation to an amount of interest which had been paid and discharged by the debtor. Both from the above decision and from the context in which this expression appears in the section, it seems to us that the 'interest due' means interest still remaining payable by the debtor and cannot be equated to interest both paid and still remaining to be paid.

Once again we must emphasise that section 13 must receive its interpretation not islotated from the several provisions contained in the Act. While we agree that the intention of the Legislature was to provide a measure of relief to indebted agriculturists, the Legislature designedly classified the debts in accordance with the dates of their origin. They graded the quantum of relief which they decided to grant to the agriculturists according as the debt was incurred prior to the 1st October, 1932, during the period of acute depression, or between the 1st October, 1932, and before the commencement of the Act, or after the commencement of the Act. The three classes of cases were differently dealt with and the quantum of relief which the Legislature granted to each class of cases was different. It is further undeniable that the law did not render invalid any contract containing a stipulation for the payment of interest above any particular figure. Nor was it the intention of the Legislature to interfere with contracts entered into after the commencement of the Act. If these premises are granted, it seems to us that where a debtor voluntarily makes a payment of interest at the contract rate, the Legislature did not intend to step in and interfere with that payment in any manner. In the light of the decision of the Full Bench in *S.M. Taraganar* v. *Sankarapandia Mudaliar*[1], also, which we accept as correctly laying down the law, notwithstanding that the Andhra Pradesh High Court has differed therefrom, we are of the view that section 13 does not permit the re-opening of a transaction and re-appropriation of any interest payment made with the consent of the debtor.

A great deal of argument has been advanced on the basis of section 72 of the Contract Act. According to the counsel for the debtors, any payment, over and above 6¼% or 5½%, as the case may be, is a payment made as a result of a mistake in law, and which, as the interpretation of section 72 of the Contract Act stands at present, would enable the person making the payment to recover from the payee. This argument to our minds begs the question. Unless we can postulate from the wording of section 13 that the charging of or the acceptance of interest at a rate higher than 6¼ per cent. or 5½ per cent., as the case may be, is prohibited by the law, no question of payment made under a mistake in law can possibly arise. In the view that we have taken that the Legislature did not purport to interfere with contracts entered into subsequent to the commencement of Act IV of 1938 but only denied the suing creditor the right to recover interest at the contract rate, if it exceeded the rates provided in that section, the contract was not illegal; nor was the payment at a rate higher than 6¼ per cent illegal. There could thus be no mistake in law of such a payment voluntarily made by the debtor. Obviously section 72 of the Contract Act will not apply. If this is the correct view of the legal position, then it follows that the re-opening of the transaction and re-appropriation of the interest payment already made, which can only be rested on the right of the debtor to recover payments made under any mistake of law, is not warranted when no mistake in law can possibly be postulated.

Our attention has been drawn to *Chandrasekharan Pillai* v. *Thangavelu Pillai*[2], where Jagadisan, J., following *Sreenivasa Rao* v. *Abdul Rahim Sahib*[3], held that the words in section 13 of the Act that the Court shall scale down all interest are of sufficiently wide amplitude to give jurisdiction to the Court to re-appropriate amounts paid by the debtor in excess of the satutory rate of interest so as to bring the transaction between the parties in conformity with the statute. The learned Judge referred

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1. (1958) 2 M.L.J. 568 (F.B.).
2. (1961) 1 M.L.J. 172.
3. (1956) 2 M.L.J. 189.

to *S.M. Taraganar* v. *Sankarapandia Mudaliar*[1], the Full Bench decision, and proceeded to explain it on the ground that in that case only a settlement of accounts which involved an acknowledgment of liability by the debtor to pay interest at a higher rate than the statutory rate was in question. He observed referring to the Full Bench decision :

> " The creditor founded himself on the last settlement of accounts. But the debtor wanted to have that settlement re-opened. Their Lordships pointed out rightly, if I may say so with respect, that there was no machinery provided for under section 13 of the Act to have settled accounts re-opened and to trace back the debt to its inception. The actual decision of the Full Bench does not in any way conflict with the decision in *Sreenivasa Rao* v. *Abdul Rahim Sahib*[2].

On this reasoning the learned Judge reached the conclusion set out above.

But in another case *Subbaroya Chettiar* v. *Vythianatha Mudaliar*[3], the same learned Judge accepted the principle laid down in the Full Bench decision as indicating that under section 13 of the Act, there was no provision to scale down the debts as in the case of sections 8 and 9 of the Act. At page 241 he observed :

> " It is not open to the Court to dissect the principal amount covered by the last promissory note and find out to what extent it comprised interest due on the earlier transactions in excess of the statutory rate prescribed under the Act. There is nothing unlawful or opposed to public policy in the act or conduct of a debtor foregoing the benefit of the stautory reduction of his liability in order to perform his contractual obligations. Voluntary payments and settlements of accounts by the debtor without availing himself of the statutory benefits, knowingly or unknowingly, cannot *ipso facto* become illegal. "

The above passage appears to indicate that the learned Judge was of the view that in a case where a debtor had made a voluntary payment of interest on the basis of the contract rate stipulated for, notwithstanding that that rate exceeded the statutory rate, such a payment would not become illegal ; the learned Judge clearly appears to have accepted the position that such a voluntary payment by the debtor would not be open to re-appropriation.

We are of the view, as we have also earlier expressed, that the Full Bench decision in *S.M. Taraganar* v. *Sankarapandia Mudaliar*[1], must in principle apply not only to settlements of account involving promises to pay but equally to actual payments of interest made voluntarily by the debtor and appropriated as such by the creditor. The machinery provided for by section 13 of the Act does not extend to the re-opening of such payments. It may not be out of place to mention that interpreting a statute, which undoubtedly is ex-propriatory in its nature, the scope of the Act cannot be widened beyond what its terms expressly warrant. The interpretation of its terms must be in favour of tne person whose rights are being expropriated and not in favour of the person who would benefit by such expropriation. In the light of this general principle also, it seems to us that it is impossible to read into the words of section 13 the existence of a power to re-open past transactions analogous to the power specifically granted under sections 8 and 9 of the Act.

Our conclusion is that *Sreenivasa Rao* v. *Abdul Rahim Sahib*[2], is inconsistent with the principle laid down in *S.M. Taraganar* v. *Sankarapandia Mudaliar*[1]. From the later Full Bench decision, it should inevitably follow that in the case of debts incurred after the commencement of the Act, the debtor is not entitled to re-open a transaction and demand re-appropriation of interest payments voluntarily made by him. In our opinion, Ganapatia Pillai, J., rightly applied the principle of the Full Bench decision in the appeal before him, as *Sreenivasa Rao* v. *Abdul Rahim Sahib*[2], is no longer good law in view of the Full Bench decision referred to.

In the result, S.A. No. 1048 of 1957 will be allowed witn costs and L.P.A. No. 55 of 1959 will stand dismissed with costs.

K.S. ——— *Second Appeal No.* 1048 *of* 1957 *allowed and Letters Patent Appeal No.* 55 *of* 1959 *dismissed.*

1. (1958) 2 M.L.J. 568 (F.B.).
2. (1956) 2 M.L.J. 189.
3. (1961) 1 M.L.J. 240.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE KUNHAMED KUTTI.

The State of Madras represented by the Commissioner for the Madras Hindu Religious and Charitable Endowments, Mount Road, Madras .. *Appellant**

v.

Thuthukudi-Kozhumbu Vyaparikalin Thuthukudi Sri Subramaniaswami Mahimai Paripalana Sangam through its Honoray Secretary (Sri R.S. Nallasivan Pillai)†— .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 6 (16)—" *Specific endowment* "—*What is.*

In order to constitute a valid endowment it is necessary that the donor should divest himself of the property and in case of dedication to God or to a charity the dedication can be effectuated orally without any necessity for a written instrument. But a mere credit entry in the account books of the donor for a certain charity will not be sufficient to create an endowment unless the amount is set apart and appropriated towards the specific object.

Ramanathan Chettiar v. *Palaniappa Chettaiar*, (1945) 2 M.L.J. 164 and *Commissioner for Hindu Religious Endowment Board* v. *Vinayakar A. T. Sabha*, (1952) 1 M.L.J. 282, followed.

Appeal against the Decree of the Court of the Suboridinate Judge, Tuticorin, dated 13th July, 1957 and passed in O.S.No.39 of 1956.

The Government Pleader (*A. Alagiriswami*) and *R. Desikan*, for Appellant.

S.V. Rama Ayyangar, for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This is an appeal against the decree of the Sub-Court of Tuticorin in O.S.No.39 of 1956 setting aside the order of the Commissioner, Hindu Religious and Charitable Endowments declaring that the plaint properties are not dedicated to any specific purpose and issuing an injunction restraining the appellant from interfering with the respondent's management of them.

The properties in dispute are comprised in three schedules, the first two being house sites with buildings thereon the third being a Nandavanam. Certain merchants in Tuticorin who were engaged in the export of onion to Ceylon formed themselves into an association called Thuthukudi-Kozhumbu Vyaparikalin Thuthukudi Sri Subramania Swami Mahimai Paripalana Sangam. At its inception and for a long time thereafter till 1930, the association was an unregistered one. The association collected, from its members some Mahimai contributions at a particular rate for consignments of onions made by them to Ceylon. A Mahimai is a donation for charity consisting of a fixed percentage on the sales or profits on commercial transactions done by the donor. The Association performed a number of festivals and charities from out of the collections. Exhibit B-8, which shows at a glance the particulars of expenses incurred from the years 1943 to 1953 indicates that out of the contributions festivals were performed in various temples, for example, Sankarameswarar Bagampiriyal temple, Sri Subramanyaswami temple a sub-shrine within the precincts of the former temple the Vishnu temple of the place, certain festivals for Sri Vinayagar, and miscellaneous charities by way of donations for education and for the maintenance of a Thevara Patasalai.

On 22nd November, 1906 the properties covered under Schdule I to the plaint were purchased by the Sangam under Exhibit B-1. The document states that the properties set out in the schedule hereunder consisting of a site, house, etc., are sold to you for the purpose of Sri Subramaniaswami. The part of the document which contains the conveyance further stated that hereafter the trustees of the Mahimai

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*Appeal No. 370 of 1957. 20th December, 1960. (29th Agrahayana, 1882, Saka).

† Now represented by the present secretary A. N. N. Muthia Pillai—cause title amended as per order in C M. P. No. 6004 of 1958, 5th November, 1958.

for the benefit of Sri Subramaniaswami shall enjoy absolutely the properties hereinafter mentioned. On 12th October, 1926 the Sangam purchased the Schedule II properties under Exhibit B 2 from the Official Receiver of Tirunelveli. That document does not refer to the Sri Subramaniaswami temple as such ; the vendee was described as the members of Tuticorin Onion Godwon Subramaniawami Mahimai. In the operative portion of the document it is stated that the vendees shall enjoy the properties conveyed absolutely for the purpose of the *mahimai.* The Schedule III property which is a Nandavanam was acquired by the Sangam sometime in 1927 under a darkhast grant made by the Government. The actual grant has not been filed. There is no evidence before the Court either primary or secondary as to the conditions in which that grant was made. In the order of the Commissioner, Exhibit A-1, it is merely stated that the Re-settlement Register showed that the land in S.No. 652/A-2 measuring about 60 cents was originally in Patta No.200-Perumal, and it was not known when and how the Sangam came into possession of the land, and acquired title to it and that it had been registered in accounts as Government dry patta lands.

The income from all the properties were systematically brought into its general account by the Sangam and was expended in performing various charities and festivals which have been indicated above.

In the year 1930 the Sangam was registered under the provisions of the Societies Registration Act. The memorandum stated that the objects of the Sangam were the performance of puja to Sri Subramaniaswami and the Siva temple in Tuticorin on festival and special occasions, as well as *kainkaryams* and *paditharam* as had been performed before that date, taking into consideration the benefit to the merchants and the general public and also for the performance of certain worship in Sri Sundara Pandiya Vinayagar temple and Sri Vishnu temple at the said place and the carrying on *paditharam* festivals, pujas, *neivedyams*, etc. After the resgistration the Society has been continuing to perform out of the contributions it received from its members as also from the income of the properties various charities and festivals in connection with the temples that have been mentioned above.

While matters stood thus, the area Committee having jurisdiction over Tuticorin began to interfere with the management by the Sangam of the properties set out in the Schedule to the plaint claiming that they formed part of a specific endowment in favour of Sri Subramaniaswami sub-shrine which itself is a part of the Siva temple. The Sangam then filed O.A. No. 100 of 1954 before the Deputy Commissioner, Tanjore, under section 57 of the Act for a declaration that the properties and the income of the Sangam were specific or religious endowments, and that therefore the Department would have no jurisdiction to interfere with the Sangam's affairs in the matter of the management of the various charities and festivals. The Deputy Commissioner by his order, dated 31st October, 1955 rejected the claim and held that the properties were endowed for the services in Sri Subramaniaswami temple, and that they thereby consitituted a specific endowment under section 6 (16) of Madras Act (XIX of 1951). Aggrieved by the order of the Deputy Commissioner, the Sangam preferred an appeal to the Commissioner but that met with no success. Thereafter the suit out of which this appeal arises was instituted under the provisions of section 62 of the Act.

The learned Subordinate Judge held that there has been no valid dedication of the properties in favour of the Sri Subramaniaswami temple, and in that view set aside the order of the Commissioner of the Hindu Religious and Charitable Endowments. It is the correctness of this decree that is challenged in this appeal by the State.

The case for the appellant is that the properties in Schedules I to III formed part of a specific endowment for Sri Subramaniaswami. The term 'specific endowment' has been defined in section 6 (16) of the Act as meaning :

" Any property or money endowed for the performance of any specific service or charity in a math or temple, or for the performance of any other religious charity, but does not include an inam of the nature described in *Explanation* (1) to clause (14)."

The substantial question for cosideration in the present case is whether a valid endowment of the properties has been created in favour of Sri Subramaniaswami. It will be noticed that the name of the Society itself is Thuthukudi Kozhumbu Vyaparikalin Thuthukudi Sri Subramaniaswami Mahimai Paripalana Sangam. That is merely the name of the society. The name cannot by itself import the idea that the Sangam was the lawful trustee of the funds belonging to the temple. The reference in the name to the Mahimai for Sri Subramania Swami cannot be dissociated from the rest of the name so as to imply that there was a trust to Sri Subramaniaswami Temple. A society is an association consisting of individuals. Whether the funds collected by them was for general charitable purposes or for specific purposes of puja in any particular temple is to be ascertained irrespective of the consideration what the name adopted by the Society would suggest. Generally where subscriptions are collected from others for a specific charity or for a specific religious purpose, there would be no doubt a trust created for that purpose. The intention of the various donors in such cases would obviously have been to benefit that particular object of the trust. But where subscriptions are collected, not for a specific purpose, but for a general, religious or charitable purposes, the individual donors leave the object of the charity to be determined by the persons collecting. The only condition will be that they should be devoted to the charity and not directed to other purposes. The persons collecting the moneys would be the trustees for the charity. That cannot by itself mean that any specific endowment is created in favour of a single institution or beneficiary. In the present case there is no evidence to show that the donors made their contributions for any particular purpose or for any particular religious institution. On the other hand there is sufficient evidence to indicate that the institution was dealing with the amounts collected as its property, no doubt, for religious and charitable purposes, the temple or other charity getting what the Sangam in its discretion thought fit to give from time to time. As we indicated earlier, there is nothing to show that the Sangam itself was formed to administer any endowment made to Sri Subramaniaswami temple. The object of the Sangam as disclosed in the memorandum filed with the Registrar of Societies which can in the absence of other evidence be taken as indicating the intention with which it was founded, and also its conduct all these years, show that it is not a mere trustee for administration of a kattalai in Subramaniaswami temple, but was entrusted with the mangement of the Mahimai collections which was presumably intended for various unspecified religious or charitable purposes. It would, therfore, follow that contributions collected by the Sangam and properties purchased by it in its own name cannot *ipso facto* in the absence of any dedication by the Sangam itself become the property of any temple. It may no doubt happen that the Sangam itself might have so set apart or dedicated the properties in favour of a particular temple or charity in such a way as would amount to a specific endowment for the temple. In such a case the property so founded would cease to belong to the Society but would be vested for the specific purpose designated. Has there been such an endowment in this case?

In order to constitute a valid endowment it is necessary that the donor should divest himself of the property. What is essential is that there should be an unambiguous expression of an intention to divest and an actual divestment for the benefit of the beneficiary, for example the temple or the particular purpose specified. Such divestiture can be proved by a written document. But as dedication to God or to a charity is not a transaction *inter partes* the provisions of the Transfer of Property Act will not apply and dedication can be effectuated orally without any necessity for a written instrument. So also a trust for a public purpose. In either case, that is making of an endowment or creating a public trust, the fact of dedication can be established by evidence. Such evidence may consist of contemporaneous statements or merely of subsequent conduct of the trustee. In either case there should be clear and cogent evidence to show that there was an intention to dedicate the property for the particular purpose followed by an actual divestment or appropriation of the property to the specific object.

It is not an uncommon practice for the commercial community in this part of the country to make credit entries in the books in the names of various charities or

for religious objects. Sometimes these allotments in accounts are made more as a matter of convenience of the individual person setting apart the money without any intention to vest the fund or charity straightaway in any charity or temple. A mere credit entry in an account book of the donor will not be sufficient to create a trust. But the case will be different where the amounts are actually set apart and appropriated towards the specific object. The law on this subject has been stated, if we may say so with respect, succinctly in *Ramanathan Chettiar* v. *Palaniappa Chettiar*[1]. The learned Judges in that case held that an allocation of specific property or fund to charities is essential both for effecting an endowment and for creating a valid trust and a mere credit entry in the donor's account books without setting aside and appropriating the sum credited is not sufficient to create a valid trust. A case more or less similar to the one we are considering came up for decision before the learned Chief Justice and Venkatarama Ayyar, J., in *Commissioner for H.R.E. Board* v. *Vinayakar A.T. Sabha*[2]. There an unregistered society, which was subsequently registered, purchased a property from moneys collected by way of subsrciptions from the members of the society. One of the objects of the Society was to perform the Arudhra festival in a temple. The learned Judges held that in the circumstances of the case it could not be said that there was any specific endowment of the entire or part of the income of the property for a specific religious charity as there was no divesting of the ownership even as regards the income and that it was open to the Society to change its objects.

It has next to be considered whether there has been a specific endowment of the suit properties in the present case in favour of Sri Subramaniaswami temple. As we said earlier the properties set out in Schedule I was purchased by the Sangam in its name but the terms of the document clearly show that the property was purchased specifically for the benefit of the temple. It may be that the moneys which went in for the purchase belonged to the Sangam itself. But the Sangam can set apart its property or provide its money for the purchase of property for the benefit of the temple. From the terms of Exhibit B-1 it is clear that it was the intention of the Society to purchase the property for the benefit of the temple, it being expressly stated that the property was purchased for the benefit of Sri Subramaniaswami.

In *S.M. Sanatan Dharam High School Trust* v. *Managing Committee S.M. Rajput High School*[3], the owner of a certain property constituted a Committee for the management of a school for which he endowed considerable properties. One of the properties which was transferred in favour of the Committee was a mortgage document. The consideration was to be paid by the donor and the document was to be taken in favour of the Committee. The document said,

> " We have mortagaged, without possession, the aforesaid land to the High School Indaura. . . started in the name of. . . .residents of Indaura. . . . .for Rs. 6,000. . . ."

The Privy Council held that that constituted a clear dedication of the mortgagees' rights to the school with the consequent vesting in the Committee. There can be no doubt that in the present case when the document was taken for th specific purpose of Sri Subramaniaswami, it constituted an endowment for the temple.

The same cannot be stated with regard to the properties in Schedule II and Schedule III. Schedule II has been purchased by the Sangam under Exhibit B-2. Independent of what one can speculate from the name of the Sangam itself, there is nothing in the document to indicate that the property was intended for any specific purpose in connection with the Sri Subramaniaswami temple or of any temple for the matter of that. In the circumstances the property can only constitute the property of the Sangam. So far as this item is concerned the facts are more or less analogous to the facts in *Commissioner for H.R.E. Board* v. *Vinayakar A.T. Sabha*[2] Following that decision it must be held that there has been no dedication of this property to the Sri Subramaniaswami temple. As regards Schedule III we have already stated that there

1. (1945) 2 M.L.J. 164.
2. (1952) 1 M.L.J. 282.
3. L.R. 65 I.A. 106 : (1938) 1 M.L.J. 359 (P.C.).

is no evidence in the case to show dedication thereof to Sri Subramaniaswami temple. The only evidence in the case is the conduct of the Sangam itself. That as we stated earlier did not treat any property as specifically devoted to any particular institution but instead the income from all the properties were brought into the general account of the Sangam and spent upon various religious festivals and charities which the Managing Committee of the Sangam chose to perform from time to time.

The learned Government Pleader contended that there was an admission made by the Sangam before the Deputy Commissioner, which would show that the Schedule III properties belonged to the temple. But unfortunately the order of the Deputy Commissioner has not been exhibited in the case ; it is not possible for us to ascertain what the admission was and whether such an admission proved any unequivocal expression of an intention to dedicate the property to Sri Subramaniaswami Temple. Having regard to the conduct of the Sangam itself, it must be held that there is no proof of any such dedication. The Sangam has been performing festivals and paying for the services in various temples. It is impossible to say from the conduct of the Sangam that any one of the two items in Schedule II or Schedule III has been dedicated to the temple. We are therefore of opinion that the decree of the learned Subordinate Judge has to be modified by declaring that the properties in Schedule I do constitute a specific endowment for Sri Subramaniaswami temple. In regard to the other two schedules we are in agreement with the learned Subordinate Judge that it has not been proved that there was any specific endowment in respect of those properties.

The appeal will therefore be partly allowed by declaring that Schedule I properties constitute a specific endowment within the meaning of scetion 6 (16) of the Act for Sri Subramaniaswami temple. This does not however mean that the general trustee of the temple would be entitled to take charge of the properties. Being a specific endowment the trustees will be the respondent Sangam itself.

There will be no order as to costs in either of the Courts.

R.M. *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

B. Radhakrishnan .. *Petitioner**

v.

The State of Madras, represented, by the Secretary, Home Department, Fort St. George, Madras and others .. *Respondents.*

Motor Vehicles Act (IV of 1939)—*Motor Vehicles plying in Pondicherry Settlements—Bits of South Arcot territory intercepting the routes—G.O. directing the Regional Transport Authority to permit the vehicles to run on South Arcot Territory—Validity of—Section* 47 (1) *of the Act—Scope—Constitution of India* (1950), *Article* 226—*Writ of mandamus with reference to the G. O.—Writ—Discretionary power to issue.*

The Settlements of Pondicherry do not constitute a compact block but include a number of enclaves inside the district of South Arcot. Bus permits were given from one part of Pondicherry enclave to another intercepted by bits of South Arcot territory. The G. O. under consideration directed the Regional Transport Authority, South Arcot, to permit stage carriages plying on routes within the Pondicherry State to run on portions of those routes lying within the South Arcot district. The G.O. (No. 198 passed on 25th January, 1958) contained further directions.

Held: For more than a century and a quarter the residents of the enclaves have been exercising their rights of free passage and repassage for themselves for their animals and for their vehicles subject only to the payment of tolls, octroi dues and certain customs duties. If parliament had intended to abrogate these rights it would have made express provisions. The G.O. under consideration merely recognizes the existence of the customary rights of passage and repassage and attempts to give effect to them. The G.O. cannot be construed as an attempt made by the State to dispense with the law (Motor Vehicles Act) in favour of any individuals.

If the authority had the power to pass an order, such an order cannot be said to be vitiated by reason only of a quotation of the wrong section of the enactment.

A Writ of *mandamus* will not issue to direct a person to institute legal proceedings.

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*W.P. Nos. 1376 of 1956 and 412 of 1958. 24th March, 1959.

The Court has a measure of discretion in the issue of a writ of *mandamus*. To issue the writ would be to place an intolerable burden of inconvenience on numerous citizens.

The enclaves are numerous and they consist of tiny bits of land. It would be impossible to make separate arrangements for running transport vehicles across these enclaves. The issue of a writ would set at nought the usage of more than a century and a quarter. The circumstances of the case are pre-eminently such that the writ should be refused.

Section 47 (1) of the Motor Vehicles Act does not require the authority to notify a proposal to open a new route. It merely enumerates various considerations which the authority empowered to grant a permit shall have regard to when dealing with the applications for permits.

Where the Regional Transport Authority has yet made no orders to the prejudice of the petitioner the writ petition is liable to be dismissed on the sole ground that it is premature.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the Respondents to forbear from enforcing the G.O. Ms. No. 1846, Home Department, dated 27th June, 1956, directing the Regional Transport Authority, South Arcot to permit the stage carriages plying on routes within the Pondicherry State to run on portions of these routes lying within the South Arcot district.

M. K. Nambiar and *K. K. Venugopal*, for Petitioner.

The Additional Government Pleader (*K. Veeraswamy*), for Respondents.

The Advocate-General (*V. K. Thiruvenkatachari*) and *V. Ramaswami*, for 3rd Respondent.

The Court made the following

ORDER.—By a treaty concluded in 1814 between England and France all the possessions in India which had belonged to the French on the 1st January 1792 were to be restored to them. The French also bound themselves not to erect any fortifications in India and to keep in their establishments only such troops as were, "necessary for the maintenance of the *Police*." In pursuance of this treaty the territories in question were actually handed over to the French in December, 1816. (*Vide* page 418 of Volume I of the *South Arcot District Gazetteer*).

The territories that were so handed over to the French included what we formerly used to call the French Settlements of Pondicherry. These settlements do not constitute a compact block but include a number of enclaves inside the district of South Arcot. It is impossible to enter some of these enclaves or emerge from them without crossing Indian territory. For instance a person who wants to go from Pondicherry Town to Canniacovil, both in Pondicherry territory, has to cross a bit of land, a little less than two miles wide, running past the village of Rettichavady. To go from Villenour to Madagadipet both in Pondicherry territory, one has to cross Indian territory in two places. Before one can go from Pondicherry to Tircanour Indian territory has to be crossed in about three places. There are several other similar instances. Likewise there are bits of Indian territory which cannot be ordinarily reached except by passing through Pondicharry territory. Before one can reach Rettichavady from Cuddalore it is necessary to go through Canniacovil which is included in Pondicherry territory. There are a number of villages which form part of the territory of India which lie west of Ariancoupam village and south of Ariancoupam river which are wholly encircled by Pondicherry territory. It is common knowledge in the locality that there are numerous ryots who live in Pondicherry territory but who own agricultural lands in Indian territory and *vice versa*. For 130 years and more the residents of the enclaves attached to Pondicherry have been passing and repassing over Indian territory without let or hindrance. Similarly residents of what I may call Indian enclaves have been passing and repassing over Pondicherry territory. And this observation applies not merely to men and animals but also to vehicles of every description. No passports or visas were ever required. The only restrictions imposed on free travel across the enclaves were those created by the obligation to pay tolls, octroi duties, custom levies and licence fees when a vehicle was kept—and not merely taken through—in India or Pondicherry as the case may have been.

Sometime before 10th December, 1941 the Government of Madras suggested to the Governor of the French Establishments in India that a reciprocal arrangement be entered into by which vehicles registered in Pondicherry would be exempt from the payment of tax under the Madras Motor Vehicles Act for the use of specified short stretches of territory in India, and motor vehicles registered in Madras using certain stretches of French territory would be similarly exempted from the levy of French tax and tolls. The suggestion of the Madras Government was accepted and on 10th December, 1941 the Government of Madras issued a notification specifying the routes covered by the agreement.

Subsequently there was a *de facto* transfer of the former French Establishments in India to the Government of India. On 10th February, 1956, the Secretary, General Administration, Pondicherry, wrote to the Chief Secretary to the Government of Madras explaining that the residents of Pondicherry often found it necessary to take out lorries carrying goods from Pondicherry to Chidambaram, Kumbakonam, Salem, Vellore and other places and requesting the Government of Madras to instruct their Transport Authorities to issue

"concurrant permits for running at least 15 buses and 15 lorries from Pondicherry, 5 buses and 5 lorries from Karaikal and 2 buses and 2 lorries from Mahe."

This suggestion led to further correspondence and a distinction was made between vehicles passing from one enclave to another and vehicles proceeding from Pondicherry to destinations in the Indian Union. In a D.O. letter dated 6th May, 1956, which he addressed to the Deputy Transport Commissioner, Madras, the Inspector-General of Police, Pondicherry stated,

"The Pondichery enclave, as you know, is something like a geographical jigzaw puzzle, with small bits of South Arcot territory forming islands in it. Bus permits are given from one part of this Pondicherry enclave to the other and very often in between a small bit of South Arcot territory intervenes. In such cases, I feel that South Arcot should give permit automatically. It is not a case of someone being allowed to ply to a terminus in South Arcot District. It is only making it convenient for people of this State to go from one part of the State to another within Pondicherry enclave. If it is a question of going from Pondicherry to Karaikal it is a different matter. But the facility for going from one station to another in Pondicherry enclave itself should not be dependent on the transport authority of South Arcot District. This problem should be considered separately and a specific directive issued to the South Arcot Transport Authority to automatically give their concurrence in such cases."

On this the Deputy Transport Commissioner, Madras, wrote to the Secretary to the Government of Madras in their Home Department in which he stated,

"I agree with the Inspector-General of Police that pending orders on the general question of reciprocity in the grant of permits between Madras and Pondicherry Transport Authorities the problem of allowing transport vehicles of Pondicherry to operate on routes within enclaves in Pondicherry State but interrupted by small bits of territory included in South Arcot District should be solved. This can be satisfactorily solved only if the Regional Transport Authority, South Arcot automatically grants permits valid for the bits of territory within this State and intercepting Pondicherry territory. I suggest that the Government may be pleased to issue a direction to the Regional Transport Authority, South Arcot under section 43-A of the Motor Vehicles Act to issue permits as suggested above to achieve the object in view for the vehicles already having permits in Pondicherry State for such routes."

On 14th June, 1956, the Deputy Transport Commissioner and State Transport Authority, Madras, wrote to the Secretary to Government, Home Department, Madras, explaining that the problem

"must be viewed in two aspects :

(1) The question of grant of permits for Pondicherry based vehicles to ply on regular inter-State routes, *i.e.*, one end of the termini lying in Pondicherry and other lying in Madras State.

(2) The question of grant of permits for Pondicherry based vehicles to ply on routes connecting Pondicherry and its enclaves in the South Arcot District in Madras State."

Dealing with the latter question he stated,

"Regarding point (2) above, no question of reciprocity arises. *The fact remains that Pondicherry based vehicles have all along been allowed to ply on these routes without permits even though the vehicles have to pass through a portion of the Madras State territory.* It is relevant to mention in this connection that some of the roads in South Arcot District through which these vehicles have to pass are stated to be maintained by the Pondicherry State Authorities and that the Regional Transport Officer, South Arcot is examining the matter in consultation with the Divisional Engineer, Highways concerned. As suggested in

my letter fourth-cited, I request that Government may be pleased to issue a direction under section 43-A of the Motor Vehicles Act to the Regional Transport Authority, South Arcot, requiring it to grant permits automatically to the Pondicherry based operators having permits in Pondicherry State to ply their vehicles between Pondicherry and its enclaves in the South Arcot District."

On 27th June, 1956, the Government of Madras issued an order, the operative part of which runs as follows :

" In exercise of the powers conferred by section 43-A (2) of the Motor Vehicles Act, 1939 (Central Act IV of 1939) the Governor of Madras hereby directs the Regional Transport Authority, South Arcot to permit stage carriages plying on routes within the Pondicherry State to run on portions of those routes lying within the South Arcot District."

I notice that though in the preamble to the G.O. reference is made to the suggestion that the R.T.A., South Arcot, should *automatically grant permits* to enable stage carriages to run without interruption from one enclave to another, the operative part of the G.O. merely directs the Regional Transport Authority, South Arcot, *to permit* stage carriages plying on routes within the Pondicherry territory to run on portions of those routes lying within the South Arcot District. It does not direct him to issue permits. He is not directed to do anything positive ; he is merely directed to permit the vehicles to run, that is to say, to refrain from taking any proceedings against them when they do run.

The petitioner in W.P.No.1376 of 1956 is one Radhakrishnan who is the proprietor of a bus service which has its headquarters in Cuddalore N.T. In the affidavit he filed in support of his petition he claims that he owns about 14 buses, that about eight of them run every day between Cuddalore and Pondicherry and that " they do 42 single trips between Cuddalore and Pondicherry ". He has been in this business for ten years. Between Cuddalore and Pondicherry there is an enclave attached to Pondicherry territory. That enclave is administered by the officers of the Indian Union as part of Pondicherry State. The buses of the petitioner that run between Cuddalore and Pondicherry have to pay various taxes in Pondicherry. These include a quarterly tax of Rs.4 per seat, a bus-stand fee of Re. 1-4-0 for every trip and a toll of 12 annas for every bus per day. There are a few buses which start from Pondicherry owned by the citizens of Pondicherry but, these

"never extended their operations to the enclave a Mullodai-Kirumambakkam, the enclave being amply served by the petitioners bus service and some other bus services."

Some Cuddalore operators used to apply for permission to take additional trips through the enclave to Pondicherry on the same route. But the Regional Transport Authority had been consistently turning them down on the ground that the route was amply served.

On the basis of the G.O. dated 27th June, 1956

" some operators from Pondicherry have applied to the Regional Transport Authority, South Arcot, for permits to run their buses from Pondicherry through the Indian territory in South Arcot District to the aforementioned enclave."

The petitioner understands that these applications were going to be allowed as a matter of routine and almost as a matter of right and that there was no intention to levy any tax for such permits. He complains that the G.O. is *ultra vires* and invalid and has therefore come to this Court for the issue of an appropriate writ

" directing the respondents to forbear from enforcing the G.O. Ms. No. 1846, Home Department, dated 27th June, 1956, directing the Regional Transport Authority, South Arcot, to permit the stage carriages plying on routes within the Pondicherry State to run on portions of these routes lying within the South Arcot District."

This petition was filed on 12th November, 1956. Following further discussions the Government of Madras passed on 25th January, 1958, a G.O. bearing No. Ms. 198 in which they issued the following directions :

" The Government direct that through bus service should be provided subject to the following conditions :—

1. Permits can be granted exclusively by the Transport Authority of Pondicherry from one enclave to any other enclave of Pondicherry if the intervening distance in Madras State is not more than five miles at any one stretch. Existing number of buses with permits granted by Pondicherry

authorities shall be allowed and shall be regularised. In all fresh cases, the Transport Authority of Pondicherry and Regional Transport Authority, South Arcot, should agree between themselves before granting permits. (ii) The ratio on which the permits shall be issued on any route by the two States shall be on the basis of 4 : 1 as Madras is to Pondicherry.

2. Order exempting the buses in respect of which permits have been issued by the Pondicherry Authority from payment of tax, when the distance of the route lying in Madras State is 5 miles and less (from enclave to enclave) would issue separately.

3. The Transport Commissioner is requested to issue necessary instructions to the Regional Transport Authorities concerned in the matter of detail for implementing the decisions cited."

In these two writ petitions we are concerned only with enclaves whose width is less than five miles, and, on the basis of this G.O., buses holding permits from the Transport Authorities of Pondicherry would be entitled to cross and recross the enclaves as a matter of right. All that the Regional Transport Authority, South Arcot, is required to do is to regularise this. But how he is to "regularise" this is not explained in the G.O. Apparently some operators understood the G.O. to mean that they would have to make a formal application to the Regional Transport Authority, South Arcot, for permission to run their buses across the intervening bits of Indian territory and that their applications would be granted as a matter of routine.

One D. Padmanabhan, one of the respondents in these two writ petitions, owns two buses bearing Nos. P-1846 and P-1847, which run between Pondicherry and Canniacovil *via* Rettichavady. In pursuance of G.O. Ms. No. 198 dated 25th January, 1958, he applied to the Regional Transport Authority, South Arcot for the grant of permit to run these two buses through the Indian enclave of Rettichavady. The Regional Transport Authority notified this application and invited objections thereto.

Writ Petition No. 412 of 1958 has been filed for the issue of an appropriate writ prohibiting the Regional Transport Authority, South Arcot

"from proceeding with the grant of a permit in respect of his buses P. 1846 and P. 1847 on the portion of the route Pondicerry to Kannicovil *via* Reddichavady, lying in the Madras State, in pursuance of the notification A-2/9316/58 dated 23rd April, 1958, issued under section 57 (3) of the Motor Vehicles Act, 1939".

So far as Writ Petition No. 1376 of 1956 is concerned Mr. Nambiyar, the learned Counsel for the petitioner pressed in the main three points. The first was this. The Motor Vehicles Act and the Rules framed thereunder constitute a complete Code. There is a general prohibition in the Act against using a motor vehicle in any public place except after compliance with various requirements laid down in the Act and the Rules framed thereunder. The vehicle must first be registered and before it can be registered it must conform to certain prescribed standards. No one can drive a motor vehcle unless he holds a licence obtained after passing the prescribed driving test. No one can ply a motor vehicle for hire except after obtaining a permit and before a permit can be obtained numerous stipulations have to be complied with. When the Government of Madras issued G.O. Ms. No. 1846 dated 27th June, 1956 what in effect and substance they did was to dispense with the law of India in favour of certain persons who held licences and permits from the authorities in Pondicherry. This they have no power to do. Wherever the Legislature decided to exempt any class of vehicles from the operation of any part of the Act it has taken care to say so. Thus by Act C of 1956 a new section 24-A was inserted making special provision for the registration of motor vehicles of diplomatic officers and some others. Section 33 of Act C of 1956 empowers the State Government to declare in certain cases that certificates of fitness issued by a competent authority in the State of Jammu and Kashmir shall be valid and effective in the other States of India. Similarly, sub-section (5) to section 63 which was introduced by Central Act C of 1956, empowers the State Government to

"specify the conditions subject to which a document issued by a competent authority in the State of Jammu and Kashmir authorising the use of a motor vehicle as a Transport vehicle may be deemed for the purpose of sub-section (1) to be a permit granted under this Chapter in the State."

Mr. Nambiyar pointed out that there are no similar exemptions in respect of vehicles registered in Pondicherry.

He next argued that the G.O. purports to have been issued in exercise of the powers conferred by section 43-A (2) of the Motor Vehicles Act and that this section confers no such power. That sub-section only empowers the State Government to direct a Regional Transport Authority or the State Transport Authority to open a new route or to extend an existing route or to permit additional stage carriages to be put, or to reduce the number of stage carriages on a specified route. It does not confer the power to direct that vehicles covered by a Pondicherry permit shall be permitted to run on Indian territory without complying with the requirements of the Motor Vehicles Act and the Rules framed thereunder.

When dealing with these contentions of Mr. Nambiyar, the learned Advocate-General read certain passages from two text books on International Law, and, it may be as well to quote some of them. Thus on page 386 of his book on International Law Fenwick writes,

"Thus far the jurisdiction of a State over territory has been discussed as if it implied a right of absolute political control, whether over land, water or air. This is, in fact the normal situation. Territorial sovereignty or jurisdiction carries with it a presumption of exclusive rights of use and disposal of the object over which sovereignty is exercised. Nevertheless, by exception, the jurisdiction of a state over its territory may be subject to restrictions in favour of other states without encroachment upon the formal sovereignty of the State whose jurisdiction is thus restricted. These restrictions upon territorial jurisdiction have, by the analogy of similar resirictions long known to municipal law, been designated as " servitudes " and they may be defined as obligations on the part of the State in possession of the territory to permit a certain use to be made of it by or in favour of another State or States. The corresponding right on the part of the other State to make such use of the territory of the first State may, for convenience be designated as an " easement"; but it should be noted that the latter term has not yet found its way into international law. The term " servitude " and the object indicated by it have now obtained recognition in international law ; but there is still no general agreement as to the restrictions that may properly be designated as servitudes or as to the legal character of the limitations they impose upon the State subject to them."

And then, on page 387 :

" A distinction should be observed between customary or prescriptive servitudes, created as a result of long continued usage and conventional or contractual servitudes created by express agreement between the parties. In both cases the servitude imposed may be in favour of a single State or of third States in general. Again, a particular servitude, such as the obligation to grant a right of innocent passage through territorial waters, may be one to which all States in general are subject and of which all States alike may enjoy the benefit. Where this is the case, it has been questioned whether the general restriction should properly be called a servitude. Usage is too recent to decide the point, but convenience would seem to justify the application of the term in such cases. So long as international law recognizes no common rights of all nations to the use of other property than the high seas, general restrictions upon national territorial property can, it is submitted, be more easily explained as servitudes than in any other way ".

See also pages 536 to 542 of the Eighth Edition o fOppenheim's International Law, Volume I.

The learned Advocate-General argued that the right of transit across intervening enclaves which arise in this case whether we call it servitude or give it some other name—is mutual and reciprical and that the provisions in the Motor Vehicles Act requiring users of motor vehicles on public roads to conform to various requirements have not the effect of destroying them. The discussions at the Bar on this aspect of the case covered some little ground. But the subject is still in parts obscure and there appears to be considerable divergence of opinion among leading writers on the subject. One matter, however, is clear. For more than a century and a quarter the residents of the enclaves have been exercising the right of free passage for themselves and for their animals and their vehicles subject only to the payment, as I said before, of tolls, octroi dues and certain customs levies. No doubt, if the Indian Parliament were so minded, it could enact legislation denying or refusing freedom of passage across Indian territory. But, no such legislation has been enacted. Mr. Nambiyar however insisted that the provisions of the Motor Vehicles Act are general in terms and of universal application to every inch of Indian soil and so it must be considered that the right of free passage has been denied. Ordinarily when an Act of the Indian Parliament says that it applies to the whole of India it would naturally apply to every inch of Indian soil. But that is not the real question here. The real question is whether Parliament intended to abrogate

the rights of free passage which were being enjoyed for so many years. If Parliament had any such intention, I would expect it to have made explicit provision in that regard. The G. O. which is now impugned merely recognises the existence of the customary rights of passage and repassage and attempts to give effect to them. I do not read the G.O. in question as an attempt made by the State Government to dispense with the law in favour of any individuals.

It is no doubt true, as Mr. Nambiyar said, that special provisions are incorporated in the Act in respect of Jammu and Kashmir and in respect of diplomatic officers. But, I do not regard the omission to make any provision in respect of the rights of passage and repassage now under consideration as necessarily expressing an intention on the part of the Indian Parliament to do away with those rights. One may properly doubt whether the peculiar position in this part of South Arcot was ever present in the mind of Parliament at all. If it had been, Parliament could hardly have failed to make some special provision in respect of those matters as it must have realised that otherwise intolerable inconvenience would be caused to a large number of people.

The third argument of Mr. Nambiyar that section 43-A (2) does not confer on the Government the power to issue the order they did is no doubt technically correct. But, that is not sufficient to dispose of the matter and it does not follow that the order issued by Government is bad and must be quashed.

At this stage I would refer to *Anjaneya Motor Transport* v. *State of Madras*[1]. On page 379, Rajagopala Ayyangar, J., who delivered the judgment of the Bench, observed :

> " The other contention that was urged was that no appeal lay to the Government against the order of the Central Road Traffic Board passed through its Secretary refusing the variation, and that the order of the Government did not disclose that their revisional juridiction was invoked or that they intended to exercise such revisional powers. We do not consider that there is much substance in this objection because *if the authority had the power to pass the order such an order could not be held to be vitiated by the caption given to it.*"

Another consideration is relevant here. Notwithstanding the language of the preamble to the G.O., the operative part of it merely directs the Regional Transport Authority, South Arcot, to permit Pondicherry vehicles to run through Indian enclaves, *i.e.*, to say he is to keep his hands off and do nothing to them. When the petitioner asks that the G. O. should be quashed, what he in effect and substance wants is that the Regional Transport Authority should be directed to institute legal proceedings against Pondicherry vehicles running through Indian enclaves without obtaining permits from Indian authorities. Now, there is authority for the position that a writ will not normally issue for a purpose of this kind. In *Nagpur Glass Works, Ltd., Nagpur* v. *The State*[2], it was held that :

> "a writ of *mandamus* will not lie to compel a person to institute legal proceedings."

I would next observe that in a matter of this kind the Court has a measure of discretion. See paragraph 161 of Halsburys Laws of England, Third edition, Vol. 11:

> "The grant of an order of *mandamus* is, as a general rule, a matter for the discretion of the Court. It is not an order granted as of right and it is not issued as a matter of course. Accordingly, the Court may refuse the order, not only upon the merits, but also by reason of the special circumstances of the case. On the other hand the Court may grant leave to apply for an order of *mandamus* even though the right in respect of which it is sought appears to be doubtful.
>
> The Court will take a liberal view in determining whether or not the order shall issue, not scrupulously weighing the degree of public importance attained by the matter which may be in question, but applying this remedy in all cases to which, upon a reasonable construction, it can be shown to be applicable."

The Supreme Court of India expressed itself to much the same effect in *Sangram Singh* v. *Election Tribunal*[3]:

1. (1955) 2 M.L.J. 376.
2. I.L.R. (1954) Nag. 839.
3. (1955) 2 M.L.J. 13 : (1955) S.C.J. 431 at 434 : (1955) 2 S.C.R. 1 (S.C.).

"That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as Courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of cases unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no Legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the Legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of cases."

In my judgment the circumstances of this case are pre-eminently such that the writ should be refused. To issue the writ would be to place an intolerable burden of inconvenience on numerous citizens of this country and another adjoining territory which, as a matter of actual fact, is administered by the officers of the Indian Government. The enclaves are numerous and they consist of tiny bits of land. In quite a few cases there are no habitations where the road leaves one enclave and enters another enclave. It would be impossible to make separate arrangements for running transport vehicles across these enclaves. If the writ asked for in this case were to issue, this Court must be prepared, on grounds of logic and consistency, to insist that persons moving from one enclave to another should also provide themselves with passports and visas in the same way as if they were going from India to a foreign country, and, this would be, as I indicated above, to set at nought the usage of more than a century and a quarter.

The main objections urged by Mr. Nambiyar in Writ Petition No. 412 of 1958 were these. Under various orders issued from time to time Government have prescribed a particular procedure for the grant of permits for stage carriages or for the variation of permits already issued to such carriages. First of all, before a new route is opened, the Regional Transport Authority must issue a notification under section 47 of the Motor Vehicles Act intimating that it is proposed to open a particular route. Objections must then be called for from operators who would be affected by the opening of the proposed route as well as from the local and police authorities and others. The Regional Transport Authority has to hear their objections and then submit his recommendation to the Transport Commissioner. The Transport Commissioner, in his turn, has either to accept or reject the recommendation of the Regional Transport Authority. After it is decided that a new route should be opened a fresh notification has to be issued and applications invited from operators under section 57 (2) of the Act. Then a further notification has to issue under section 57(3) giving the names of the various applicants and inviting representations and objections from operators. There has to be a public hearing and then the permit would be granted to the applicant considered most eligible. This procedure was not followed in the present case. The 2nd respondent made an application for the grant of a permit that would enable him to run through Indian enclaves and his application was at once notified. It is not possible to justify the action of the Regional Transport Authority on the ground that only the variation of an existing permit already given to the second respondent was involved because the procedure for varying a permit is substantially the same as the procedure for issuing a new permit. Besides, the procedure applicable for the variation of a permit cannot apply where the permit sought to be varied is that issued by a foreign authority in this case the authorities in Pondicherry.

The first observation I would make on this argument is this. It may be that in notifying the application of the second respondent straightaway the Regional Transport Authority did not conform to various orders issued by Government. But the fact remains that the procedure he adopted does not involve any contravention of any statute.

It is alleged in paragraph 9 of the affidavit filed in support of the petition that:

"Section 47 (1) of the Act requires the Regional Transport Authority to notify a proposal to open a new route under the section."

That section, however, says no such thing. It merely enumerates various considerations which the authority empowered to grant a permit shall have regard to, when dealing with applications for permits. That section itself does not require that any application to open a new route should be notified. Every person has a right to apply for a permit. Whether the application should be granted or not, it is for the concerned authority to decide ; only he is bound to deal with that application according to law. When therefore the Regional Transport Authority notified the application of the second respondent he was not contravening any provision of the statute.

The objection based on the assumption and which is referred to in paragraph 10(*b*) of the affidavit filed in support of the petition that the second respondent was asking for a variation of the permit is really beside the mark. No doubt the appropriate Indian authority can vary only a permit granted by an authority in India. He cannot vary a permit issued by an authority in Pondicherry. But, there is nothing to prevent the appropriate Indian authority from granting a permit to a vehicle in such a manner that together with the permit granted by the authority in Pondicherry it would be possible for an operator to run continuously from one enclave to another.]

In the welter of argument and counter-argument we must guard against forgetting one simple fact and that fact is that at this stage no order has been made by the Regional Transport Authority, South Arcot. He only invited objections to the application made by the second respondent. The second respondent was entitled to make an application and the Regional Transport Authority was bound to deal with that application. It is open to any body interested in the matter to approach the Regional Transport Authority and tell him that the application of the second respondent should not be granted. The statute lays down the more important considerations which the Regional Transport Authority has got to take into account before coming to a decision. It will be time enough for the person aggrieved to come to this Court after the Regional Transport Authority has disposed of the application in a particular manner. This petition is liable to be dismissed on the sole ground that it is premature. The Regional Transport Authority has yet made no orders to the prejudice of the petitioner.

In the result, both these writ petitions are dismissed, but, in view of the peculiar circumstances of this case, there will be no order as to costs.

V.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHAMED KUTTI.

Ponnusamy Maistry *alias* Ponnusami Pillai .. *Petitioner**

v.

V. V. Venkatarama Chetty and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 33 *rule* 1, Explanation (a)—'*Sufficient means*'—*What is.*

The words 'sufficient means to enable him to pay the Court-fee' in rule 1 of Order 33, Civil Procedure Code is not equivalent to possession of sufficient properties. The possession contemplated is not possession of the requisite property but the means *i.e.*, the capacity to raise the money necessary for payment of Court-fee. In deciding the question of means it is for the Court to decide, on the facts of each case, whether it should take into consideration or not the subject-matter in dispute.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge of Salem, dated 26th September, 1959 and made in O.P. No. 156 of 1958.

P. Kothandaraman, for Petitioner.

R. Ramamurthi Ayyar, C. S. Swaminathan and *R. Shanmugam,* for Respondents.

* C.R.P. No. 1795 of 1959.

21st December, 1960.
(30th Agrahayana, 1882, Saka).

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is against the order of the learned Subordinate Judge, Salem, dismissing petitioner's application O.P. No. 156 of 1958 for leave to sue *in forma pauperis*.

The petitioner had executed a trust deed dated 1st October, 1946 authorising seven persons nominated thereunder to sell his properties and discharge his debts. He is said to have revoked the trust deed on the ground that the trustees had not properly administered the trust, but on the other hand had acted in violation of the terms of the trust deed, and had thus rendered themselves liable to account to him. In the plaint filed along with the application for leave he prayed, among other things, for declaration that he had validly revoked the trust deed and the alienations by the trustees are void, invalid and not binding on him ; for possession of the several items of properties and for accounting from the trustees. On the valuation of the several reliefs claimed in the plaint the Court-fee payable is a sum of Rs. 23,805-50 nP. The petitioner alleged that he has no sufficient means to pay the Court-fee, that though he is possessed of the house in the plaint B Schedule and has obtained a decree against one Lourduswami for Rs. 81,000 odd, he was unable to raise any money on the house property, that the decree obtained against Lourduswami is under appeal and that even the amount deposited by the judgment-debtor in connection with his stay application could not be withdrawn as he was unable to furnish security to the satisfaction of the Court.

All the defendants in the plaint 37 in number are respondents to the petition also. They include the trustees, creditors and alienees of the petitioner. Several of them contested the application for leave. The substance of their contention was that the petitioner had ample properties and assets out of which he could pay the requisite Court-fee and therefore he was not entitled to the leave prayed for. In particular, they pointed out that the B Schedule house which is still in the possession of the petitioner and has not been handed over to the truseee, is worth Rs. 40,000 and contains furniture and vessels worth about Rs. 3,000 that he owns house-sites worth Rs. 30,000 in Kichipalayam, Salem town, subject to a mortgage of Rs. 10,000 and that he has lands worth Rs. 5,000 in Pudukottah limits.

The learned Subordinate Judge was not inclined to accept the case of the contesting respondents regarding the movables and vessels, house-sites in Salem town and the land in Pudukottah limits as being available to the petitioner for the purpose of raising funds for payment of Court-fee. He, however, found that the house in the possession of the petitioner is worth Rs. 40,000 and that no steps had been taken by the petitioner to raise funds on this house or for withdrawing the Rs. 20,000 in Court deposit, that if he had done so, he would have had sufficient means to pay the necessary Court-fee and that in the circumstances he could not be considered to be a pauper. He, therefore, dismissed the petition with costs of the respondents. This Civil Revision Petition is directed against the said order.

The legal position is beyond controversy. Though the petitioner is possessed of considerable properties, the case has to be considered with reference to clause (*a*) of the *Explanation* to Rule 1 of Order 33, Civil Procedure Code. This clause is to the effect that :

> " a person is a pauper when he is not possessed of *sufficient means* to enable him to pay the fee prescribed by law for the plaint in a suit ".

The words " sufficient means to enable him to pay Court-fee " are not equivalent to " possessed of sufficient properties to enable him to pay the Court-fee " in other words, possession that is spoken of in the *Explanation* is not possession of property but of sufficient means. What the Court is concerned therefore is not actual possession of properties but the capacity to raise money necessary to pay Court-fee. This is one aspect. The other aspect is that clauses (*a*) and (*b*) of the *Explanation* being disjunctive, where there is a fee prescribed in the plaint it cannot be said that the subject-matter in dispute can in no circumstances be taken into consideration on the question whether the plaintiff is possessed of sufficient means to enable him

to pay Court-fee. On the other hand it is for the Court to consider in each case whether such subject-matter should or should not be excluded. Keeping in view these two aspects, we have now to consider whether the petitioner is possessed of sufficient means to pay Court-fee required for his plaint by reason of his being in possession of the B Schedule house included in the plaint and also by reason of the amount deposited by the judgment-debtor Lourduswami.

Dealing first with the house in the possession of the petitioner, it is not seriously disputed that it is worth about Rs. 40,000. Though this house is included in the trust deed, and the trust is said to have been revoked by the petitioner, no doubt the question of its validity would be in issue, but it is the petitioner's case that he is competent to deal with the property in his own right. In the circumstances, just because it is included in the plaint, it cannot be left out of account in considering whether the petitioner is possessed of sufficient means. The question however is whether he is able to raise any funds on his property. The petitioner is prepared to alienate this property if any of the respondents is prepared to offer him sufficient money. No one is prepared to do so. On the other hand it would appear from the counter-statement of the 4th respondent that no one will advance money on this property. The main ground on which the learned Subordinate Judge negatived the petitioner's claim for being adjudged a pauper is that he had not taken steps to raise funds on this property. It would appear that there were attachments on this property to an extent of Rs. 7,000 and an equitable mortgage had also been created by the petitioner in respect of certain borrowings made by him. After Lourduswami deposited Rs. 20,000 as a condition precedent to the stay of execution of the decree against him, the petitioner offered the very house as security before the Subordinate Judge, Tiruchirapalli, first on 26th May, 1959 and again on 1st February, 1960. On both the occasions, the Court found that the security was not sufficient and proper for the sum of Rs. 20,000. The orders rejecting the security have now been produced by the petitioner. No doubt, these orders were passed subsequent to disposal of O.P. No. 156 of 1958. But in the peculiar circumstances of this case, I am directing the same to be admitted in evidence. The second order rejecting security dated 11th March, 1960, appears to have doubted the title of the petitioner to the property and the learned Subordinate Judge took the view that even if the petitioner has title, mortgages in favour of Radhakrishna Chettiar and Venugopala Mudaliar are still subsisting and therefore the house cannot be deemed to be proper and adequate security for the amount which the petitioner wants to withdraw. Whatever be the merits of this observation, the point is whether in the face of the above observation and in view of the trust deed the validity of which is in question the petitioner could have raised funds by sale, mortgage or otherwise, sufficient to pay the requisite Court-fee. On a consideration of all the circumstances of the case I am inclined to hold that it is not possible for the petitioner to raise any substantial sum on the security of the house in question. The resultant position is that while he is unable to raise any funds on the house in his possession, he has also not been able to withdraw the amount deposited by Lourduswami. It is not mere ability in the abstract but ability to raise money in the circumstances of the particular case in order to pay the requisite fee that has to be taken into consideration in determining whether the petitioner is possessed of sufficient funds.

It would appear that in the appeal preferred by Lourduswami the petitioner filed a memo. of cross-objections claiming a further sum of Rs. 25,000. He sought leave to file this memo. of cross-objections *in forma pauperis* and the order of this Court in C.M.P. No. 2698 of 1959 shows that leave prayed for was granted to him, on a finding recorded by the Second Additional Subordinate Judge, Tiruchirapalli. The learned Subordinate Judge found on enquiry, that the petitioner is not possessed of sufficient means at present within the meaning of Order 33, rule 1, *Explanation* (1) (*a*) of the Civil Procedure Code and that until the contingency of his withdrawing the amount in Court deposit happened, his incapacity to deposit the requisite Court-fee has to be recognised. I should mention here that the Court-fee payable on the

memo. of cross-objections was only Rs. 1,072-8-0. The order of this Court in the Civil Miscellaneous Petition and the finding of the learned Subordinate Judge, Tiruchirapalli, have also been produced by the petitioner in C.M.P. No. 6305 of 1960 allowed by me today.

I am satisfied that the petitioner is not possessed of sufficient means to pay the requisite Court-fee in this case and therefore he is entitled to the leave prayed for. Accordingly I allow this Civil Revision Petition, set aside the order of the lower Court and allow O.P. No. 156 of 1958 with costs throughout.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Natesa Pillai .. *Petitioner**

v.

Mahalinga Padayachi .. *Respondent.*

Madras Cultivating Tenants Protection Act, (*XXV of* 1955), *section* 4-*A* (5)—*Right of landlord to resume possession of lands for personal cultivation not available to landlord on date of coming into force of the Act—If available to purchaser from the landlord after coming into force of the Act.*

The petitioner, who purchased the land in question after the Madras Cultivating Tenants Protection Act, 1955, came into force, applied for resumption of lands for personal cultivation, from the respondent cultivating tenant. The Revenue Court held that the petitioner was not the landlord on the date the Act came into force and hence not entitled to resume possession. On appeal,

Held : (1) That there is no reason to interpret the words "any subsequent change in his circumstances " occurring in section 4-A (5) of the Act as referring only to the disqualifications specified in section 4-A (4) since the words of the section are plain and unambiguous. The change in his circumstances, (namely, purchase after the Act came into force) did not entitle the petitioner to resume possession from the cultivating tenant.

(2) That a promise to surrender possession will not affect the right of the cultivating tenant to remain in possession without eviction under the Act.

Petition under section 6-B of Act XXV of 1955 as amended by Act XIV of 1956 read with section 115 of Act V of 1908 praying the High Court to revise the order of the Revenue Court, Kumbakonam, dated 14th July, 1959 and made in P. No. 304 of 1959.

S. Nagaraja Ayyar and *V. Krishnan,* for Petitioner.

K. V. Sankaran and *S. Ramaswami,* for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition involves a short point, which has some degree of interest. The revision petitioner is the petitioner before the Revenue Court of Kumbakonam in an application for resumption of lands for personal cultivation under section 4-A (2) of the Madras Cultivating Tenants Protection Act (XXV of 1955). As is well-known section 4-A declares the right of a landlord to resume possession from a cultivating tenant of an extent not exceeding one-half of the lands leased out to such tenant, for purposes of his personal cultivation. But this section is qualified by section 4-A (5) which is in the following terms :

" No person who is not entitled to resume possession under this section on the day the Madras Cultivating Tenants Protection (Amendment) Act, 1956, comes into force, shall be deemed to be so entitled by reason of any subsequent change in his circumstances."

In the present matter, the cultivating tenant (respondent in the Court below) has been paying rent on this holding as on warram tenure, not merely to the petitioner but even to his predecessor-in-title. The petitioner (revision petitioner) alleged an oral agreement under which the respondent agreed to surrender possession on a particular date. But he failed to do so, and this is one of the grounds

* C.R.P. No. 1674 of 1959. 29th April, 1960. (9th Vaisakha, 1882, Saka).

upon which the revision petitioner attempts to have the order of the lower Court set aside. But however this might be, the presiding officer of the Revenue Court found, as a question of fact, that the petitioner was not the landlord on the relevant date referred to in section 4-A (5) set forth by me earlier, and that, in consequence, he was not entitled to resume possession under section 4-A (1) of the Act. But, if the matter is to be judged from the standpoint of the previous landlord, that landlord was admittedly not entitled to resume possession under section 4-A because, within the scope of section 4-A (4), that landlord was disqualified upon one or more of the grounds stated in that sub-section, as a disqualification for a landlord attempting to resume possession for personal cultivation. The learned presiding officer observed :

> " The petitioner who has merely stepped into the shoes of that landlord will have to suffer from the disqualification referred to in clause (4) of section 4-A".

This was one ground on which the petition was dismissed.

Learned counsel for the revision-petitioner urges that this ground is fallacious. According to him, the personal disqualifications attaching to the predecessor-in-title ought not to be considered when a decision is given upon the right of the present petitioner, who admittedly is free from such disqualification, to resume personal cultivation. With this argument I am inclined to agree. But the petitioner has clearly to be non-suited with reference to his application upon a stronger and more cogent ground. Section 4 (5) explicitly declares that a person who was not entitled to resume possession on the day the Madras Cultivating Tenants Protection (Amendment) Act, 1956, came into force, cannot be subsequently entitled by reason of any change in the circumstances. Admittedly, the petitioner was not so entitled, because he was not a landlord at all in respect of the holding on the relevant date. He became subsequently entitled by virtue of a change in his circumstances, *viz.*, the purchase of this holding, which entitled him to apply under section 4-A (1). Hence, within the scope of section 4-A (5), the petitioner could not sustain this application. The argument is that section 4-A (5) is limited by the language of section 4-A (4), and that the words " any subsequent change in his circumstances " must be interpreted as referring only to the disqualifications specified in section 4-A (4). I see no reason to interpret section 4-A (5) in this manner, as the words of the section are plain and unambiguous. Further the legislature has not used other qualifying words, which would restrict the application of the section as it stands. It is a well-understood canon of interpretation of statutes, which has even recently been affirmed by the Supreme Court in *Sri Ram Ram Narain* v. *State of Bombay*[1], that where the words of a statute are plain and unambiguous, and can be given effect to as they stand, it is not permissible for the Court to import other phraseology of restriction or qualification which has not been used. Consequently I am of the view that the order of the learned presiding officer of the Revenue Court is correct, though not wholly upon the reasoning set forth in that order.

With regard to the surrender, upon the record this seems to merely amount to a promise to surrender possession, which would ordinarily be enforceable under the civil law. But, undoubtedly, it will not affect the right of the cultivating tenant to remain in possession of his holding without eviction under Madras Act XXV of 1955 ; this proposition is undeniable, and admits of no controversy or dispute.

There is another ground of justification for the order of the lower Court, *viz.*, that the petitioner applied for cultivation of this extent upon *pannai* which ordinarily means hired labour. But section 2 (*ee*) defines personal cultivation as cultivation where the person " contributes his own physical labour or that of the members of his family, in the cultivation of that land". However, I am not deciding the application upon this point, since it appears to me that the application is very clearly precluded upon the facts, by virtue of the language of section 4-A (5) already referred to.

1. (1959) 2 M.L.J. (S.C.) 1: (1959) 2 An.W.R. (S.C.) 1: (1959) S.C.J. 679: A.I.R. 1959 S.C. 459.

In result, therefore, the revision petition fails and is dismissed. But since this might very probably have been a *bona fide* attempt on the part of this petitioner to obtain possession of the holding that he had purchased, for the purpose of direct cultivation, and he himself does not appear to be a landlord possessed of more appreciable properties, I direct that the parties shall bear their own costs.

K.L.B. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

T. V. Sundaram Iyengar & Sons, Private Limited, Madurai .. *Petitioner**

v.

The Deputy Commercial Tax Officer, Madurai Town I and another .. *Respondents.*

Madras General Sales Tax (Definition of Turnover and Assessment) Act (XVII of 1954) *and Turnover and Assessment Rules,* 1939, *Rule* 12—*Applicability—Notice demanding repayment of tax duly refunded under orders of Court—Validity.*

Rule 12 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, will in terms apply only to the case of an original assessment. The rule contemplates only an arithmetical computation after the order of assessment is made. Where a demand or refund certificate has been issued the rule ceases to have effect except in cases covered by rules 14-A and 15 (2) of the General Sales-tax Rules. Though the Madras Sales-tax (Definition of Turnover and Assessment) Act, 1954, validated the levy of tax on certain turnovers, it has not provided any machinery for recovery of amounts refunded to an assessee before the Act. Rule 12 of the Turnover and Assessment Rules cannot be invoked in such cases.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed with W.P. No. 252 of 1957 on the file of the High Court, the High Court will be pleased to call for the records of the Deputy Commercial Tax Officer, Madurai Town I, in proceedings Nos. A/3/520/48-49 and 49-50 respectively dated 5th August, 1956 together with the demand in 'B' Form enclosed therewith and issue a writ of Prohibition or such other writ prohibiting the 1st Respondent from enforcing the demand made by him.

K. V. Venkatasubramania Iyer and *N. R. Govindachari*, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), for Respondents.

The Court made the following

ORDER :—*Ramachandra Iyer, J.*—These are petitions under Article 226 of the Constitution for the issue of appropriate writs prohibiting the first respondent from enforcing payment of a portion of the sales tax collected but later refunded to the petitioners.

The petitioners are dealers in automobiles and their parts having their business at Madurai. In respect of their turnover during the years 1948-49 and 1949-50, they were provisionally assessed to sales tax and such tax was duly paid by them. In the course of their business, the petitioners, who are registered dealers, had collected from their customers the sales tax payable on goods sold to them. In the final assessment to sales tax, the Deputy Commercial Tax Officer included in the assessable turnover collections of sales tax made by the petitioners, with the result that a sum of Rs. 4,927-2-6 in respect of the assessment year, 1948-49, and a sum of Rs. 13,369-9-3 in respect of the year, 1949-50, were assessed as tax on the sales tax collected. Those amounts as also the tax assessed on the actual turnover were covered by the amount paid in respect of the provisional assessment and were duly appropriated therefrom. The liability to tax on the sales tax collected by treating it as part of the turnover was disputed *inter alia* by the petitioners both before the Deputy Commercial Tax Officer and the Commercial Tax Officer on appeal. Neither of them accepted the contention of the petitioners. There was a further

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* W.P. Nos. 252 and 253 of 1957. 17th Feburary, 1960 (28th Magha, 1881, Saka).

appeal to the Sales Tax Appellate Tribunal. The Tribunal held that the petitioners were not liable to pay sales tax on the sales tax collections made by them, and directed the refund of that portion of the amount representing the tax on sales tax collected which had been appropriated by the Department. An attempt on the part of the respondent to challenge the correctness of the order of the Tribunal, by way of revision to this Court, failed. While the revision petitions were pending in this Court, the Deputy Commercial Tax Officer issued refund voucher in Form C under Rule 12 of the Turnover and Assessment Rules for the sums of Rs. 4,927-2-6 and Rs. 13,369-3-3 on 2nd March, 1953 and 7th May, 1953, respectively for the excess amounts collected for the years, 1948-49 and 1949-50. An undertaking was taken from the petitioners that they would re-pay the tax refunded in case the High Court were to set aside the orders of the Sales Tax Appellate Tribunal. That contingency did not happen, as the High Court affirmed the order of the Sales Tax Appellate Tribunal. That was in January, 1954. In holding that there could be no levy of sales tax on the sales tax collected, the view of the Appelllate Tribunal and the High Court was in conformity with the decision reported in *Deputy Commissioner of Commercial Tax* v. *Krishnaswami*[1], to which one of us was a party. It was there held that, under the scheme of the Madras General Sales Tax Act, an amount collected by a registered dealer from consumers by way of sales tax and paid over to the Government should not be included in the turnover of the registered dealer as part of the sale price of the goods sold, and that the amount was not liable to be taxed over again.

Subsequent to the order of the High Court in the revision petitions, the Madras Legislature passed the Madras General Sales Tax (Definition of Turnover and Validation of Assessments) Act, 1954 (Madras Act XVII of 1954). The Act received the assent of the President on 6th July, 1954, and contains three sections, of which sections 2 and 3 (1) are alone material. They run as follows :—

"2. In the case of sales made by a dealer before 1st April, 1954, amounts collected by him by way of tax under the Madras General Sales Tax Act, 1939 (Madras Act IX of 1939) (hereafter referred to as the principal Act), shall be deemed to have formed part of his turnover.

3. (1) All assessments and collections made, all orders passed, and all action taken by any officer in the exercise or purported exercise of jurisdiction or powers conferred by the principal Act, and all judgments, decrees, or orders pronounced by any Tribunal or Court in the exercise of its jurisdiction of powers with respect to matters in the principal Act, on the basis that amounts collected by a dealer by way of tax under the principal Act before the 1st April, 1954, formed part of the turnover of the dealer are hereby declared to have been validly made, passed, taken or pronounced, as the case may be ; and any finding recorded by any officer, Tribunal or Court to a contrary effect and any order, judgment or decree in so far as such order, judgment or decree embodies or is based on any such finding and does not relate merely to the costs of the proceeding which resulted in the judgment, decree or order, shall be void and of no effect"

(*Proviso* omitted as immaterial).

On the basis of the provisions contained in Act XVII of 1954, the Deputy Commercial Tax Officer issued notices on 5th August, 1956 in Form B (Rule 12, Turnover and Assessment Rules) calling upon the petitioners to remit the amounts of Rs. 4,957-2-6 and Rs. 13,369-3-3 which had been paid over to them by virtue of the refund vouchers referred to already. It is the validity of these notices that is impugned in these petitions.

It cannot be disputed that, as a result of the provisions of Act XVII of 1954, the amounts collected by an assessee before the 1st of April, 1954, from his customers by way of sales tax would be deemed to form part of his turnover and be liable to sales tax, notwithstanding the decision in *Deputy Commissioner of Commercial Tax* v. *Krishnaswami*[1]. Even if a matter has been the subject-matter of a decision by an Officer, Tribunal or Court holding that such amounts were not taxable as a part of the turnover, section 3 (1) makes all such decisions, findings, etc., to the contrary effect void and of no legal effect. The result, is that, notwithstanding the order of the Sales Tax Appellate Tribunal and that of this Court in revision cases therefrom, the original assessment by the Deputy Commercial Tax Officer, wherein the petitioners were held liable to pay the sales tax on the sales tax collected by them from the customers, would stand. Act XVII of 1954 contains not merely a positive

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1. (1954) 2 M.L.J. 151.

statement that the sales tax collected would properly form the turnover of a dealer, but also nullifies the effect of an order by a Court or Tribunal to the contrary. It follows that the petitioners would be liable to be assessed to sales tax on the amount of sales tax collected by them from their customers during the period covered by the years 1948-49 and 1949-50.

But the more important question in the present case is whether the amount, which had been refunded to the petitioners by the first respondent in pursuance of the order of the Sales Tax Appellate Tribunal, could be collected by the Government under the machinery provided by the Madras General Sales Tax Act. A similar question arose in a slightly different form in W.P. Nos. 503, etc., of 1957. In that case, an amendment of section 3 (1) (*b*) effected by Act XV of 1949 enabled enhanced collection of sales tax at the rate of 4½ pies in a rupee in a case where articles of food and drink were sold in hotels, while the standard rate of tax was only three pies per rupee on the total turnover in all other cases (liability to tax arising only when the total turnover was above Rs. 25,000). The constitutional validity of that provision was negatived by this Court on the ground that it amounted to unreasonable discrimination, and contrary to Article 14 of the Constitution . The Legislature, thereupon, passed Act XV of 1956, which rendered the provision relating to enhanced rate of levy applicable to all cases without discrimination. Section 17 of the Act (the latter enactment) stated that all taxes levied or collected under the original provision would be deemed to have been collected under the new provision, notwithstanding anything contained in any judgment, decree or order of any Court. In that case, before the amending Act was passed, the assessee was re-paid the excess collected from him over the standard rate of three pies in a rupee. After the passing of Act XV of 1956, the Deputy Commercial Tax Officer issued a notice of demand to recover the tax refunded. Rajagopala Ayyangar, J., held that the effect of section 17 of Act XV of 1956 was only to validate the levy and collection of the tax that was already made, but that did not enable re-collection of what had been refunded under a valid order of Court, particularly when such refund would not be held to be under any mistake of law. The learned Judge held that, if the tax had remained uncollected, the provisions of section 17 would enable a levy or collection at the enhanced rate, but those provisions would not enable the Government to get back what was collected at the higher rate and refunded under valid order of a Court. It might be noticed that section 17 of the Act did not nullify orders, passed by Courts. The principle of that decision cannot, however, apply to the present case, where the effect of section 3 of Act XVII of 1954 is to make all orders, whether by Court or Tribunal, invalid with the result that what now stands as the order of assessment is the original order of the Deputy Commercial Tax Officer, assessing turnover by including the amount of sales tax collected by the petitioners from their customers. Section 3 would also make the order of refund void and of no legal effect.

But the mere fact that the orders of the Sales Tax Appellate Tribunal and the High Court in revision and the orders of refund pending the revision cases were rendered invalid and of no legal effect, could not nullify or reverse the factum of refund. By reason of the subsequent enactment if the petitioners became disentitled to the amount of refund possibly they are not entitled to retain the same. How is that amount to be got back by the Government? Can that be done under the power under Rule 12? In other words, the question in the present case is not so much whether the refund is valid or invalid, but whether the machinery provided by the Act enables the Government to get back the money refunded to the petitioners. The impugned notices, calling upon the assessees to pay back the amount purport to be issued under the provisions of Rule 12 of the Turnover and Assessment Rules. That rule states :—

"After making the final assessment under sub-rule (2) or (3) of rule 11, the assessing authority shall examine whether any and if so, what amount is due from the dealer towards it after deducting any tax already paid on the provisional assessment, with reference to rule 7, rule 8 or sub-rule (4) of rule 11. If any amount is found to be due from the dealer towards the final assessment, the assessing authority shall serve upon the dealer a notice in Form B, and the dealer shall pay the sum demanded at the time and in the manner specified in the notice. If the tax due on the final assessment is lower

than the tax already paid on the provisional assessment, he shall serve upon the dealer a notice in Form C for refunding the excess tax. If the final assessment is exactly equal to the tax already paid on the provisional assessment the assessing authority shall inform the dealer what the final assessment is and that no further amount is due from him towards it."

Rule 12, on its terms, will only apply to the case of an original assessment. If the tax due under the final assessment is found to be lower than the tax paid on the provisional assessment, the officer is directed to issue a notice in Form C for refunding the excess tax. If the former is less than the latter, a notice in Form B is to be issued, making a demand on the assessee for the amount of the deficit. No question will arise, if the amount paid by way of provisional assessment is equal to that assessed as tax. What the rule contemplates is a mere arithmetical computation after the order of assessment is made. There is no power to alter or correct the amount or to issue notices in Form B or C more than once. To illustrate the position. We can refer to a simple case, where the assessing authority has made a mistake in the calculation of the tax. Suppose the assessing authority on the basis of such a mistake finds that the assessee had paid by way of provisional assessment more than what he was assessed to and thereupon gives a refund certificate in Form C which is duly cashed. Under the provisions of the Madras General Sales Tax Act, there is no power in that authority to rectify the mistake ; the mistake can be rectified only in revision. Thus in regard to an original assessment there would be no occasion for the assessing authority to issue a notice in Form B or C more than once. When an assessment is varied in appeal or revision, Rule 12 does not enable an issue of Form B or Form C notice to collect the deficiency in or refund the excess payment of tax. The rule making authorities have, therefore, provided separate rules for the purpose. Rules 14-A and 15 (2) of the Madras General Sales Tax Rules provide for the case of modification of assessment by the appellate and revisional authorities. They state :—

" 14-A. Where the tax as determined by the initial assessing authority appears to the appellate authority under section 11 or revising authority under section 12 to be less than the correct amount of the tax payable by the dealer, the appellate or revising authority shall before passing orders, determine the correct amount of tax payable by the dealer issuing a notice to the dealer and after making such enquiry as such appellate or revising authority considers necessary.

15. (2) The order passed on appeal or revision shall be given effect to by the licensing or assessing authority who shall refund within two months from the date of the communication of the order any excess tax or fee found to have been collected and shall collect any additional tax or fee which is found to be due in the same manner as a tax or fee assessed by himself."

There would be no necessity for these provisions in the rules if under Rule 12 itself the assessing authority had a power to issue demands or make refunds on an alteration in the assessment being made by an appellate or revisional authority. Rule 12 can, therefore, apply only for those cases expressly provided for by it, that is, a case of the initial assessment. If once a demand or refund certificate has been issued, it ceases to have effect except in cases covered by Rules 14-A and 15 (2) of the General Sales Tax Rules. *A fortiorari* rule 12 cannot apply to a case where as a result of the statute like Act XVIII of 1954 there has been a variation in the assessment : neither Rules 14-A, 15 (2) nor any other rule would apply to such a case. Therefore, Rule 12 cannot be used to get back an amount refunded to the assessee by the issue of Form B notice. Under the terms of that Rule a demand notice can be issued only when the provisional tax paid is less than the tax assessed. In the absence of specific statutory provision, it is not possible to import in the construction of that rule that what was paid by way of provisional tax was what was actually paid minus the amount refunded, so that the deficiency of the resulting amount with the actual tax now validated by Act XVII of 1954 could be said to be a deficiency coming within the meaning of Rule 12. There is thus no machinery provided either in the Act or Rules to enable the Government to collect under Rule 12 the amount paid by way of refund. While Act XVII of 1954 validates all assessments to tax on the amounts of sales tax collected by a dealer and nullifies any order having contrary effect, it has failed to provide for a machinery to give effect to its provisions, to enable the authorities to recover any amount paid by way of refund by reason of any judgment or order which the statute has declared as void.

It is unnecessary for us to express any opinion in this case whether the Government might have other methods of recovering that tax from the petitioners. The demand notices in Form B served on the petitioners under Rule 12 of the Turnover and Assesment Rules are invalid, and the amount of tax refunded could not be collected by them in pursuance of such notices. An appropriate writ will be issued to that effect. There will be no order as to costs.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Messrs. Bell Mark Tobacco Company, Pudukottai and another .. *Petitioners**

v.

The Government of Madras represented by the Deputy Commissioner of Commercial Taxes, Coimbatore .. *Respondents.*

Madras General Sales Tax Act (IX of 1939), *section* 5, *clauses* (vii) *and* (viii)—" *Chewing Tobacco* "—*When a manufactured product of tobacco—Rule* 5 (1) (i) *of the Turnover and Assessment Rules—Cost of packing materials—When can be included in assessable turnover.*

Taking however, the cumultative effect of the various processes to which the assessee subjected the tobacco before he sold it, it is clear that what was eventually sold by the assessee was a manufactured product, manufactured from the tobacco that the assessee had purchased. Soaking in Jaggery water is not the only process to be considered. The addition of flavouring essences and shredding of the tobacco should establish that what the assessee sold was a product substantially different from what he had purchased. Thus the tobacco, the assessee purchased had not been subjected to any manufacturing process prior to that purchase and the process to which the assessee subjected the tobacco he had purchased before be sold it in packets as chewing tobacco is manufactring process.

Since Rule 5 (1) (*g*-ii) of the Turnover and Assessment Rules were not satisfied in that the assessee did not specify the charges and charge separately for packing, the Tribunal was right in sustaining the inclusion, of the cost of packing materials in the taxable turnover of the assessees.

The excise duty paid by the assessees when the tobacco was taken out of the warehouse should be excluded from the computed taxable turnover. He is entitled to the rebate under Rule 5 (1) (i) of the Turnover and Assessment Rules.

Petitions respectively presented under section 38 (1) of the Madras General Sales Tax Act, 1959, praying the High Court to revise the orders of the Sales Tax Appellate Tribunal, Madras, dated 31st March, 1959 and made in T.A. Nos. 996, 1010, 1011 and 995 of 1958 respectively preferred against the orders of the Commercial Tax Officer, Tiruchirappali, dated 1st October, 1958 and made in Appeals Nos. 166, 163 and 164 and 165 of 1958-1959 respectively (Assessment Nos. A-3. 6187/55-56, A-3. 6189/55-56 and A-3. 6189/56-57 and A-3. 6187/56-57 respectively on the file of the Deputy Commercial Tax Officer, Pudukkottai.

M.R.M. Abdul Karim and *P.M. Jumma Khan*, for Petitioners.

The Government Pleader (*A. Alagirisami*), for Respondents.

The Order of the Court was made by

Rajagopalan, J.—The petitioners in all these cases were dealers in chewing tobacco which they also sold in the packets prepared by them. When they were assessed to sales tax, the turnover of these sales was included in their taxable turnover. In the relevant assessment years tobacco and tobacco products were subject to the levy of sales tax at the single points specified in clauses (vii) and (viii) of section 5 of the Madras General Sales Tax Act IX of 1939.

The main question that arises for consideration in all these applications to revise the orders of the Sales Tax Appellate Tribunal is, whether the Tribunal was right in sustaining the assessment on such sales of packets of chewing tobacco effected

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* T.C. Nos. 62 to 65 of 1959, etc. 21st July, 1960. (30th Asadha, 1882, Saka).

by the petitioners. Two other questions also arise, which we shall set out in detail later.

T.C.Nos. 62 to 65 of 1959, and T.C.Nos. 32 to 34 of 1960 have come up for final disposal after notice to the respondent the State. T.C.Nos. 49 to 53, 66, 67, 79 and 80 of 1960 came up before us for orders as to admission, that is, whether notice should issue to the respondent. The questions that arise for determination by us are the same in the case of each of the assessees-petitioners.

T.C.Nos. 62 and 65 of 1959 preferred by the same assessee, Bell Mark Tobacco Co., relate respectively to the assessment years 1955-56 and 1956-57. They are applications to revise the orders of the Tribunal rejecting the appeals preferred by the assessee. The assessee preferred applications to the Tribunal to review its appellate judgments, but they were dismissed. Against those orders the assessee preferred T.C.Nos. 49 and 50 of 1960.

Similarly T.C. Nos. 63 and 64 of 1959 preferred by another assessee were against the appellate orders of the Tribunal with reference to assessment years 1955-56 and 1956-57. T.C. Nos. 79 and 80 were applications to review the orders of the Tribunal declining to review the appellate judgment in those cases.

T.C.Nos. 32 to 34 of 1960 preferred by the same assessee Md. Ibrahim related respectively to the assessment years 1955-56, 1956-57 and 1957-58. With reference to the same three assessment years another assessee Abdul Khader preferred T.C. Nos. 51 to 53 of 1960.

T.C.Nos. 66 and 67 of 1960 preferred by yet another assessee relate to assessment years 1955-56 and 1956-57.

Of the several contentions of the assessees-petitioners which the Tribunal negatived, those still in issue before us and which are common to all the petitioners are: (1) Whether the petitioners-assessees were liable to be taxed on the turnover of the sales of the packets of chewing tobacco prepared by them; (2) whether the cost of the packing materials should be excluded in computing the taxable turnover of each of the assessees; and (3) whether each of the assessees was entitled to the rebate of the excise duty paid by him on the tobacco from which he prepared and sold the packets of chewing tobacco.

Only these three questions were argued before us by the learned counsel for the assessee. He did not raise any other questions for determination.

The statutory provisions with reference to which we have to answer the first of these questions are clauses (vii) and (viii) of section 5. They ran:

"5. Subject to such restrictions and conditions as may be prescribed, including conditions as to licenses and license fees—

* * * * * * *

(*vii*) the sale of cigars and cheroots at less than two annas per cigar or cheroot, and bidis, snuff, chewing tobacco or any other product manufactured from tobacco, shall be liable to tax under section 3, sub-section (1), only at the point of the first sale effected in the State of Madras by a dealer who is not exempt from taxation under section 3, sub-section (3) but at the rate of six pies for every rupee on his turnover.

(*viii*) raw tobacco, whether cured or uncured, shall be liable to tax under section 3, sub-section (1), only at the point of the first purchase effected in the State of Madras by a dealer who is not exempt from taxation under section 3, sub-sestion (3) but at the rate of six pies for every rupee on his turnover:

Provided that where a dealer who has paid tax in respect of his turnover relating to goods included in clause (*vii*) has also paid the tax on the purchase of raw tobacco used in the manufacture of such goods under clause (*viii*) he shall be entitled to a rebate to the extent of tax paid in respect of the raw tobacco so used."

Taking into account the scheme of clauses (vii) and (viii) including the Proviso, it seems clear to us that what is brought to tax under clause (vii) is the sale of manufactured products of tobacco while clause (viii) provides for the levy of tax on sale of raw tobacco, whether cured or uncured, that is, tobacco which has not been subjected to any manufacturing process.

Cigars, cheroots, bidis and snuff referred to in clause (vii) are obviously products manufactured from tobacco. After enumerating these items and chewing tobacco, clause (vii) takes within its scope " any other product manufactured from tobacco ". In our opinion even had there been nothing else, the expressing " manufactured from tobacco " would have to be read distributively with reference to each of the enumerated items, including chewing tobacco. The expression " any other product " following the enumerated items also seems to call for such an interpretation, that the expression " manufactured from tobacco " has to be read distributively. The Proviso to sub-clause (viii), in our opinion, makes the position even clearer. The expressions in the Proviso are " goods included in clause (vii) " and " the manufacture of such goods ". They emphasise the distinction between clauses (vii) and (viii). As we said, clause (vii) provides for the levy of tax on products manufactured from tobacco, including chewing tobacco, while clause (viii) provides for levy of tax on sale of un-manufactured tobacco, that is, tobacco which has not been subjected to manufacturing process.

The learned counsel for the petitioners contended that clause (vii) applied to chewing tobacco, whether it was a manufactured product or not. He contended that in the absence of a statutory definition, the words chewing tobacco should be understood in the sense of commercial usage. He referred to passages from the Report on the Marketing of Tobacco in India, Second Edition, and pointed out that more than 80 per cent. of chewing tobacco was sold to consumers without subjecting that tobacco to any manufacturing process. The Report discloses that manufacture of chewing tobacco in the form of powder, pills and paste was common in North India. In South India to a large extent the cured leaf or portions thereof are sold for chewing. Recently dealers have marketed chewing tobacco by shredding cured tobacco and packing the shredded tobacco in packets of convenient sizes. Independent of the question, whether the process to which the petitioners subjected the tobacco they had bought was manufacturing process or not, the learned counsel for the petitioners contended that in the commercial sense the expression chewing tobacco covered both manufactured products of tobacco and chewing tobacco which had not been subjected to any process of manufacture. We shall have to revert again to the plea of the learned counsel for the petitioner, that what the petitioners purchased, from out of which they prepared the packets of chewing tobacco they sold, was itself chewing tobacco within the scope of clause (vii). Confining ourselves to the consideration of the plea, that the expression " chewing tobacco " in clause (vii) took within its scope both the manufactured product and the tobacco sold as chewing tobacco without subjecting it to any manufacturing process, we have no hesitation in rejecting that contention. As we said clause (vii) provided for the levy of tax on the sale of manufactured products, manufactured from tobacco, the enumerated products as well as the products brought under the comprehensive head " any other product manufactured from tobacco ". It would follow that, if what is sold as chewing tobacco has not been subjected to any manufacturing process, it could fall only under clause (viii) and not under clause (vii). To isolate chewing tobacco alone among the items enumerated in clause (vii), divorce it from its setting in clause (vii) and construe that expression independent of clause (vii) and in accordance with what the petitioners' counsel claimed to be the commercial usage, is not, in our opinion, justified either by the language of clause (vii) or by the scheme that underlies clauses (vii) and (viii) of section 5.

The findings of the Tribunal with reference to which we have to answer the questions were: (1) what the assessees purchased was not a manufactured product of tobacco ; that tobacco at that stage had not been subjected to any process of manufacture ; and (2) what the assessees sold was a manufcatured product of tobacco ; the tobacco they had purchased was subjected to manufacturing process before it was sold by them in packets.

If these findings stand, what we have said above, that clause (vii) applies to manufactured products, should suffice to sustain the order of the Tribunal, that on the sale of that manufactured product the assessees were liable to pay sales tax.

It was not in dispute that they were the first sellers in the Madras State of the packets of chewing tobacco in question.

The Tribunal went elaborately into the question with reference to the evidence placed before it and with reference to the passages in the Report on the Marketing of Tobacco to which its attention was drawn and came to the conclusions we have recorded above, that what the petitioners sold was a manufactured product of tobacco, manufactured from the tobacco, that they purchased, which at that stage had not been subjected to any manufacturing process. We have been taken through the evidence and the report, and we see no reason to differ from the Tribunal, even independent of the question whether the findings of fact recorded by the Tribunal should not conclude the question at issue, provided of course there was material on which those findings could be rested.

The relevant factors to be considered at this stage are as follows : The assessee purchases the tobacco and stores it in his licensed warehouse till it is required for being made into packets for sale. At the stage when the assessee issues the tobacco from the warehouse for being subjected to the further process before it was packeted, he pays the prescribed excise duty. The learned counsel for the petitioner contended that even at the stage of purchase what the assessee purchased was known to the trade as chewing tobacco. It was found that the maximum period during which the tobacco is stored in the warehouse of the assessee is about 40 days. The learned counsel for the petitioners, however, contended that very often the tobacco is taken from the warehouse much earlier. During the time the tobacco is bonded in the warehouse it has to be looked after; and one of the principal items of work to be done is known as "bulking". That process consists of sprinkling leaves with a solution of jaggery water and turning over the leaves to keep them soft and pliable and to prevent driage. After the leaf is taken out of the warehouse, it is again soaked in jaggery water. Then flavouring essences are added. The leaf is then shredded. Shredded tobacco is then packed and labelled. It should be noted that even before the assessee, purchased the tobacco it had been subjected to some process. The Tribunal was of the view, that that was not a manufacturing process but only a process to cure the leaf and keep it in a fit condition for sale. The main process to which the tobacco is subjected at that stage is that it is soacked in jaggery water, dried in shade and subjected periodically to the process of bulking we have mentioned above.

We see no reason to differ from the Tribunal, that the process of bulking and desanding to which the tobacco was subjected before the assessee purchased it did not amount to manufacturing process. What the assessee purchased was certainly not raw tobacco in the sense that it was straight off the field. It was cured tobacco. But then clause (viii) of section 5 takes within its scope both cured and uncured tobacco, which constitutes raw material for the manufacture of the products to which section 5 (vii) applies. What however is excluded from section 5 (viii) is tobacco which has itself been subjected to a manufacturing process. Whether, if tobacco which has been subjected to a manufacturing process is again subjected to a further manufacturing process by the purchaser it will fall under section 5 (vii) does not arise for consideration in this case, and we express no opinion of ours on that question. Factually the position was that what the assessee purchased had not been subjected to any manufacturing process, and therefore the sale of the tobacco, no doubt known even at that stage to the trade as chewing tobacco, did not bring that sale within the scope of section 5 (vii). It was the sale of the manufactured products effected by the assessee, manufactured from the tobacco that he had purchased, that came within the scope of section 5 (vii). No doubt soaking in jaggery water and the process of bulking were processes common both to the seller and to the assessee who purchased the tobacco. In other words, the assessee subjected the tobacco he had purchased to the same process. Had he stopped with that alone, it might be possible to contend that what he sold subsequently was not a manufactured product. Taking, however, the cumulative effect of the various processes to which the

assessee subjected the tobacco before he sold it, it is clear that what was eventually sold by the assessee was a manufactured product, manufactured from the tobacco that the assessee had purchased. Soaking in jaggery water is not the only process to be considered. The addition of flavouring essences and shredding of the tobacco should establish that what the assessee sold was a product substantially different from what he had purchased. Once again we have to point out that the fact that this assessee purchased the tobacco as chewing tobacco did not determine the question, whether the sale of the products manufactured by him from out of that tobacco falls within the scope of section 5 (vii) or not.

As what constitutes a manufacturing process has not been defined by the Sales Tax Act itself, that expression has to be construed as it is normally understood in the English language. Even then there can be no inflexible standard of universal application. What constitutes a manufactured product will have to be decided with reference to the circumstances of that case. See *North Bengal Stores Ltd.* v. *Board of Revenue, Bengal*[1]; *Hiralal Jitmal* v. *Commissioner of Sales-tax*[2]. In our opinion, the Tribunal was right in holding that the process to which the assessee subjected the tobacco he had purchased before he sold it in packets as chewing tobacco was manufacturing process, and that what was sold was a manufactured product of tobacco. We also agee with the Tribunal, and the material on record justified its other finding that the tobacco the assessee purchsed had not been subjected to any manufacturing process prior to that purchase.

As we said, once the findings of the Tribunal are accepted, it should be clear that the sales effected by the assessees fell within the scope of section 5 (vii) of the Act. The turnover of these sales was rightly included by the Tribunal in the taxable turnover of the assessees.

The next question is, whether the Tribunal was right in including in the taxable turnover of the assessees the cost of packing material they used when they effected sales of chewing tobacco. It was common ground that the requirements of rule 5 (1) (g-ii) of the Turnover and Assessment Rules were not satisfied. The assessee did not specify the charges and charge separately for packing. The liability to have the cost of the packing materials, estimated if necessary included in the taxable turnover under such circumstances is really concluded by the earlier decisions of this Court, which were reviewed in *United Bleachers Ltd.* v. *State of Madras*[3], and by the last of our decisions (unreported) in T.C. No. 20 of 1958. The Tribunal was right in sustaining the inclusion of the cost of packing materials in the taxable turnover of the assessees.

The last question is, whether the assessees were entitled to the rebate they claimed. Rule 5 (1) (i) of the Turnover Rules entitles an assessee to deduct from the assessable turnover the excise duty if any paid by the dealer to the Central Government in respect of the goods sold by him. Earlier we pointed out that the assessee has a licensed warehouse in which the tobacco he has purchased is bonded till it is issued for use, and that before it is taken out of bond excise duty is paid by the assessee. That factually each of the assessees paid excise duty to the Government was never in issue. The tribunal held:

> "The appellants have paid excise duty when the raw tobacco was transported by them from the godown where they were warehoused. Under the Excise Rules it is the grower who is liable to pay the excise duty. One of the conditions before excise duty could be deducted under Rule 5 (1) (i) of the Turnover and Assessment Rules is that it should be paid by the dealer to the Central Government in respect of the goods sold by him. The appellants have paid such excise duty only on behalf of the grower in respect of the raw tobacco (*i.e.*) raw chewing tobacco which was used by them for the manufacture of manufactured chewing tobacco on which no excise duty is payable."

We have not been shown the basis on which the Tribunal came to the conclusion, that the liability to pay excise duty lay only on the grower of the tobacco. Section 3 of the Central Excises and Salt Act (Act I of 1944) provides for the levy of excise duty "in such manner as may be prescribed ". "Prescribed" means prescribed by Rules

1. (1946) 1 S.T.C. 157.
2. (1957) 8 S.T.C. 325.
3. (1960) 2 M.L.J. 70 : I.L.R. (1960) Mad. 679 : (1959) 11 S.T.C. 278.

made under the Act (see section 2 (*g*)). Rule 2 (v) of the Central Excise Rules, 1944, defines "duty" as " duty payable under section 3 of the Act. " Rule 7 runs :

" Every person who produces, cures or manufactures any excisable goods, or who stores such goods, in a warehouse, shall pay the duty or duties leviable on such goods, at such time and place and to such persons as may be designated in, or under the authority of these Rules, whether the payment of such duty or duties is secured by bond or otherwise."

We have already pointed out that the stage at which the assessee paid the excise duty was when he removed the tobacco from his licensed warehouse to be subjected to the manufacturing process to which we have adverted before it was eventually sold either in packets or otherwise. Therefore, as a person who stored goods in a warehouse he was one on whom rule 7 cast a liability to pay the excise duty. Until he paid the excise duty he could not remove the tobacco. So it was in discharge of a tax liability imposed on him in the prescribed manner, that is by rule 7, that the assessee paid the excise duty. Rule 144 specifically provides that no goods shall be removed from any warehouse that is, a licensed warehouse, except on payment of the duty. Rule 140 regulates licensing of warehouses. That each of the assessees had a licensed warehouse in which he stored tobacco was never in issue. Rule 19 may also be referred to:

" The duty shall become chargeable as soon as products have been cured and are in a fit state for sale or where the manufacture precedes sale, for manufacture......"

In this case the duty was charged and paid at the stage when the tobacco was fit for manufacture, that is, it was taken out of the warehouse for the purposes of manufacture. Rule 29 provides :

" When the curer sells manufactured products without payment of duty as provided in rule 24, both the purchaser of the products and the person into whose possession the products pass after purchase shall become liable for the payment of the duty due thereon ; but the curer shall not be absolved from the liability laid upon him by rule 19 until the transfer of ownership has been reported to, and acknowledged by, the proper Officer."

Thus under the Rules there was a liability imposed upon the assessee to pay the excise duty before he removed the tobacco from his licensed warehouse for manufacturing chewing tobacco. The requirements of rule 5 (1) (i) of the Turnover and Assessment Rules were satisfied. We reverse the finding of the Tribunal on this point, and we direct that the excise duty paid by each of the assesees be excluded from the computed taxable turnover of that assessee. He is entitled to the rebate under rule 5 (1) (i) of the Turnover and Assessment Rules.

T.C. Nos. 62 to 65 of 1959 and T.C. Nos. 32 to 34 of 1960 will stand allowed to the extent indicated above, and the assessments will be revised accordingly to give relief to the assessees with reference to the excise duty paid by them. T.C. Nos. 49 and 50 of 1960 and T. C. Nos. 79 and 80 of 1960 will stand dismissed, as the only question raised there was the liability to tax of the sales of chewing tobacco in packets effected by the assessees, already dealt with in disposing of T.C. Nos. 62 to 65 of 1959. No order as to costs in any of these Petitions.

T.C. Nos. 51 to 53 of 1960 and T. C. Nos. 66 and 67 of 1960 will be posted separately for orders as to admission.

K.L.B. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KAILASAM.

O. Ramadoss Chettiar and others .. *Petitioners**

v.

S. R. Palanichami Chettiar and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 39 (4) *and section* 18—*Period of one month—How computed.*

The period of 30 days prescribed under section 39 (4) of the Madras Hindu Religious and Charitable Endowments Act, 1951, for filing an application to the Court to set aside the order of the Commissioner is to be computed from the date of the receipt of the order by the aggrieved party, *viz.*, hereditary trustee. The section does not contemplate excluding the time taken for disposing of a revision petition filed under section 18 of the Act.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge of Dindigul, dated 12th April, 1960 and made in O.P. No. 24 of 1959.

The Advocate-General (*V. K. Tiruvenkatachari*), *T. P. Gopalakrishnan* and *A. Narayanaswami*, for Petitioners.

N. R. Raghavachari, *V. C. Srikumar* and *G. R. Ramanujam* and The Government Pleader (*A. Alagiriswami*), for Respondents.

The Court delivered the following

JUDGMENT.—Respondents 1 and 2 in O.P. No. 24 of 1959 on the file of the Subordinate Judge, Dindigul, are the Assistant Commissioner, Hindu Religious and Charitable Endowments, Madurai, and the Area Committee, Hindu Religious and Charitable Endowments, Madurai, through its Chairman, the Assistant Commissioner. They are the petitioners in C.R.P. No. 2510 of 1960. Respondents 3 to 5 in O.P. No. 24 of 1959 are the additional trustees appointed by the Commissioner and are the petitioners in C.R.P. No. 1197 of 1960. The contesting respondents in both the Civil Revision Petitions are the hereditary trustees and are the petitioners in O.P. No. 24 of 1959. For convenience's sake, I will refer to their ranks in O.P. No. 24 of 1959.

Sri Palaniswami Chettiar and Srinivasa Chettiar, who are the petitioners in O.P. No. 24 of 1959, are the hereditary trustees of the temple of Srimath Ramalinga Sowdambigai Amman at Thevaram. They were functioning as trustees from 15th May, 1955. Respondents 3 to 5 were appointed as additional trustees by R.C. No. 2178 of 1957 dated 29th May, 1957 (Exhibit B-40). A copy of the order was served on the petitioners on 30th May, 1957. On 13th June, 1957, the petitioners filed Exhibit B-43, a petition to the Commissioner to revise the order of the Assistant Commissioner. On 13th July, 1957, the Area Committee passed a resolution, Exhibit B-42, ratifying the order of the Assistant Commissioner. After the Area Committee passed the resolution, the petitioners preferred another revision petition to the Commissioner against the resolution of the Area Committee. By a common order, Exhibit A-17, dated 30th July, 1957, the Commissioner dismissed both the revision petitions. The Commissioner's order was received by the learned counsel for the petitioners on 14th August, 1957. He applied for certified copies of the annexure to the Commissioner's order on 17th August, 1957. Stamp papers were called for on 10th September, 1957 and were furnished on 14th September, 1957. The copies were supplied on 16th September, 1957 and the petitioners filed a writ petition No. 783 of 1957 on 24th September, 1957 against the Assistant Commissioner's order. On 20th March, 1959, the writ petition was dismissed. A copy of the order in the writ petition was supplied to the petitioners on 1st April, 1959 and O.P. No. 24 of 1959, out of which the present petitions arise was filed before the Subordinate Judge on 11th April, 1959.

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* C.R.P. Nos. 1197 and 2510 of 1960.

2nd February, 1961.
(13th Magha, 1882, Saka.)

The learned Subordinate Judge, after going into the questions of fact and of law elaborately, found that the O.P. was in time and that the appointment of respondents 3 to 5 was not in the interests of the institution and, therefore, set aside their appointment.

In the revision petitions before me, the learned Advocate-General, appearing for respondents 3 to 5, raised several contentions. He submitted firstly that the petitioners are not hereditary trustees and as such they are not entitled to file an application before the Subordinate Judge under section 39 (4) of the Hindu, Religious and Charitable Endowments Act. Secondly, he contended that as the petitioners filed the revision petitions before the Commissioner against the order of the Assistant Commissioner and the resolution of the Area Committee, and as the Commissioner passed orders under section 18, the order of the Assistant Commissioner and of the Area Committee became merged in the order of the Commissioner, and the petitioners ought to have filed the writ petition and the O. P. against the order of the Commissioner. Having failed to do so, the learned Advocate-General contended that the present O.P. against the orders of the Assistant Commissioner and the Area Committee is incompetent. Thirdly, he contended that an application under section 39(4) is available to a hereditary trustee against an order passed by the Commissioner under section 39 (1) and (2). In the case of religious institutions over which the Area Committee has jurisdiction, as in this case, he submitted section 41 alone is applicable, and as section 41 does not provide for the filing of an application before Court, the application is not competent. Fourthly, he submitted that, in any event, O.P. No. 24 of 1959 in hopelessly barred by limitation. An application under section 39 (4) should be filed within 30 days of the receipt of the order. In this case, the order of the Assistant Commissioner was admittedly received by the petitioners on 30th May, 1957. The application under section 39 (4) was filed only on 11th April, 1959. The petitioners contend that the application is within time because they were prosecuting with due diligence other civil remedies against the same parties, and the time taken both before the Commissioner and before the High Court should be excluded. The learned Advocate-General contends that the time taken by the Commissioner cannot be excluded under section 14 of the Limitation Act. He urges that the time within which an application under section 39(4) should be filed is only one month, and the petitioners cannot deduct the time that was taken by the Commissioner to dispose of the revision petitions under section 18 of the Act. He also urged that the Commissioner has disposed of the revision petitions on merits and as such section 14 of the Indian Limitation Act will have no application as the petitions were not dismissed for want of jurisdiction or other cause of a like nature. He submitted finally that even if the time taken by the Commissioner is excluded, the petition is out of time, in that the period between 30th May, 1957, the date of receipt of notice by the petitioners, and 15th June, 1957, the date of the filing of the revision petition to the Commissioner (15 days), the time taken in applying for a copy of the annexure between 14th August, 1957 and 17th August, 1957 (2 days), the time taken for depositing the stamps between 10th September, 1957 and 14th September, 1957 (3 days), the time taken for filing of the writ petition from the date of supply of copies, *i.e.*, from 16th September, 1957 to 24th September, 1957 (7 days) the time taken from the date of obtaining a copy of the order passed in the writ petition (1st April, 1959) to the date of the application before the Sub-Court (11th April, 1959) (10 days) should be excluded ; the time taken in all amounts to 37 days.

Regarding the first contention of the learned Advocate-General that the petitioners are not hereditary trustees, Mr. G. R. Ramanujam, learned counsel appearing for respondents 1 and 2, fairly conceded that the Board has in paragraph 7 of its written statement accepted the petitioners as hereditary trustees. Regarding the second contention that the order of the Assistant Commissioner and the Area Committee has become merged in the order of the Commissioner and that the writ petition and the petition before the Sub-Court should have been against the Commissioner's order, it has to be noted that the Commissioner as well as the High

Court in the writ petition did not interfere with the order passed and, therefore, there is nothing to prevent the petiticiners from pursuing their remedies against the original order, if they are within time. Regarding the third contention of the learned Advocate-General that in a case where additional trustees are appointed under section 41 of the Act, no right is available to the hereditary trustees to file a petition before the Court as in section 39(4), in a decision in *Balasundara Mudaliar* v. *The Area Committee, H.R.&C. North and South Arcot at Cuddalore*[1], Rajagopala Ayyangar, J., (as he then was) has held that the provision for resorting to civil Court under section 39(4) is applicable to orders of the Area Committee under section 41 read with section 39 of the Act. The learned Advocate-General submits that the above decision requires re-consideration. But it is unnecessary to pursue the point further, because of the view I am taking regarding the question of limitation in the case.

On scrutinising the various dates, I find that the application under section 39(4) is barred by limitation. Section 39(4) provides that were the Commissioner by order appoints a non-hereditary trustee or trustees, the hereditary trustee or trustees may within 30 days of the receipt of the order, file an application to the Court to set aside or modify such order. The section as such does not make any provision for excluding the time taken for disposing of the revision petitions filed before the Commissioner under section 18 of the Act. Mr. N. R. Raghavachariar, the learned counsel for the respondents, contended that the revision petitions before the Commissioner were only a continuation of the proceedings before the Assistant Commissioner and the Area Committee and as such in calculating the time under section 39(4), it is only the date of dismissal of the petitions by the Commissioner that should be taken into consideration. He is unable to cite any authority in favour of such a proposition. On a reading of the section, I do not find any support for the view that the time taken for the disposal of the revision should be excluded. In *Nagabhushanayya* v. *Kotayya*[2], their Lordships, the learned Chief Justice and Lakshmana Rao, J., had to consider the question whether in calculating the time for filing a suit under Article 47 of the Limitation Act, the time taken in a criminal revision petition before the High Court could be excluded. An order under section 145 of the Criminal Procedure Code was passed by the Magistrate on 16th January, 1939. The matter was taken up to the High Court by way of revision and the High Court dismissed the petition *in limine* on 15th August, 1939. The suit was filed on 26th May, 1942. If the time taken for revision can be excluded, the suit having been filed within three years of 15th August, 1939, would be in time, and if it cannot be excluded, as the order of the Magistrate was passed on 16th January, 1939, the suit would be out of time. Their Lordships after considering the various authorities held that:

> "it does not follow that an order dismissing *in limine* an application for revision of an order passed under section 145 (6), Criminal Procedure Code is a final order within the meaning of Article 47 of the Limitation Act..........The application was dismissed because on the face of the petition there was no scope for the exersise of the Court's revisional powers which means that the order of the Magistrate stood entirely untouched........The order dismissing an application of this nature does not mean the substitution of the order of the High Court for the order of the Magistrate and therefore it cannot be said to incorporate his order."

Their Lordships in conclusion held that if the application for revision is accepted and the Magistrate's order is set aside, his order is no longer the final order; but until it is set aside or modified, it is. Though the above decision relates to a revision petition before the High Court against an order under section 145, Criminal Procedure Code, the reasoning is applicable to the facts of the present case, and I respectively follow it. Therefore, the time taken by the petitioners in preferring the revision petitions to the Commissioner should be excluded. In this view, it is unnecessary to consider the other objection of the learned Advocate-General that the revision petition was not dismissed by the Commsisioner due to any defective

1. (1958) 2 M.L.J. 47 : I.L.R. (1958) Mad. 637 : (1957) 71 L.W. 263.

2. (1946) 1 M.L.J. 398.

jurisdiction or other cause of a like nature in order to attract section 14 of the Limitation Act.

Even if the time taken for the revision petitions is not excluded, the application under section 39 (4) is out of time. As already observed, the order of the Assistant Commissioner was served on the petitioners on 30th May, 1957 and the revision was filed on 15th June, 1957. Two days were taken for filing a copy application and three days were taken for depositing stamps. From the date of obtaining the copies to the filing of the writ petition, there was a delay of seven days and from the date of obtaining a copy of the order in the writ petition to the filing of the application under section 39(4), there was a delay of ten days. The time taken, as I have already pointed out comes to 37 days. The learned Subordinate Judge has excluded 9th and 10th April, 1959, as they were holidays. Under section 4 of the Limitation Act, where the period of limitation prescribed expires on a date when the Court closes, the suit may be instituted on the date when the Court reopons.. If the 30th day fell on the 9th or 10th April, 1959, those days might have been excluded. But, as I pointed out already, more than 30 days had elapsed before the 9th April, 1959. In the circumstances, even if the time taken in preferring the revision to the Commissioner is excluded, the application under section 39 (4) is out of time.

Mr. N. R. Raghavachariar, learned counsel for the petitioners, finally contended that even if the application was barred by limitation, this is not a case for interference under section 115 of the Civil Procedure Code. He relied on a decision of the Supreme Court in *Keshardeo Chamria* v. *Radha Kissen Chamria*[1]. He also cited the decision of the Privy Council in *Venkatagiri Ayyangar* v. *Hindu Religious Endowments Board, Madras*[2]. I am of the view that the above two decisions are not applicable to the facts of the present case. In this case, for the civil Court to get jurisdiction, the application against an order of the Commissioner should be filed by the hereditary trustee within 30 days. If the application is not filed within time, the Court will have no jurisdiction to entertain the application. The order of the lower Court is therefore without jurisdiction and is liable to be set aside under section 115 of the Code of Civil Procedure.

In the circumstances, I hold that the order of the lower Court holding that the application under section 39 (4) is within time is erroneous. The petitions are allowed but without costs.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

Mohanambal Ammal .. *Petitioner**

v.

Selvanayaki Ammal .. *Respondent.*

Madras City Tenants' Protection Act (III of 1922), *section* 4 (2)—*Order under determining the compensation —When could be made.*

The stage at which the Court is called upon to determine under section 4 (2) of the Madras City Tenants' Protection Act, the amount of compensation payable for the superstructure, is the date on which the Court comes to the conclusion that the landlord is entitled to vacant possession. The Act does not contemplate an order determining compensation and directing its payment at any point of time anterior to the final determination of the ejectment application itself.

Petition under section 115 of Act V of 1908 praying the High Court to revise the decree of the Court of Small Causes (III Judge) Madras, dated 21st September, 1959 and passed in Ejectment Suit No. 220 of 1953.

N. Gopalakrishnan, for Petitioner.

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1. (1953) 1 M.L.J. 100 : 66 L.W. 188 : (1952) S.C.J. 633 : (1953) S.C.R. 136 (S.C.).

2. (1949) 1 M.L.J. 505: I.L.R. (1950) Mad. 1 : L.R. 76 I.A. 67 (P.C.).

* C.R.P. No. 35 of 1960.

24th February, 1961.
(5th Phalguna, 1882, Saka).

K. Srinivasan and *K. Shanmugham*, for Respondent.

The Court made the following

ORDER.—The petitioner was the defendant in Ejectment Suit No. 220 of 1953, on the file of the Court of Small Causes, Madras, an application under section 41 of the Presidency Small Causes Courts Act; and this application appears to have been dragged on till 1958, by reason of certain proceedings between the same parties in relation to the tenancy in the City Civil Court, Madras. Apparently the petitioner-tenant's contention in that City Civil Court action failed. Thereafter, this application under section 41 was taken up for disposal. It would appear that during the pendency of this application a petition was filed by the tenant-defendant for valuing the superstructure under the relevant provisions of the City Tenants' Protection Act. This was done by the appointment of a Commissioner, and on the 19th of August, 1958, the third Judge of Court of Small Causes, Madras, made an order in these terms :—

"The Petition is accordingly allowed and the value of the superstructure is fixed at Rs. 900. The plaintiff-respondent is granted three months' time to pay this amount to the petitioner-defendant."

The application itself came up for final disposal only on the 21st day of September, 1959, when, after going into merits of the case, the 3rd Judge of the Court of Small Causes, Madras, granted a decree for possession, and directed the defendant to surrender vacant possession on 21st November, 1959. It is against this order that the present Revision Petition has been filed.

The principal point that has been argued by the counsel for the petitioner-tenant is that the Court having passed an interim order within the meaning of section 4 (2) of the City Tenants' Protection Act on the 19th of August, 1959, granting three months' time to pay the amount of Rs. 900, it should have taken note of the failure of the plaintiff to pay the amount within the time stipulated and that the consequences of non-compliance with the directions of the Court thereunder must entail the dismissâl of the application under section 4 (4) of the Act.

It is conceded on behalf of the respondent-petitioner before the lower Court that, of the sum of Rs. 900 found to be the value of the superstructure, which the tenant was entitled to be paid as compensation Rs. 664 was deposited in Court on 27th October, 1958, and the balance of Rs. 236 was not deposited till 17th December, 1959, that is, within three months after the passing of the final order in the ejectment application itself.

It seems to me that the order made on 19th August, 1958 was not an interim order within the meaning of section 4 (2). What this provision contemplates is that, at the time of disposal of the application under section 41 of the Presidency Small Causes Courts Act, in which " the landlord succeeds ", the Court shall ascertain the amount of compensation payable. It is quite clear that the stage, at which the Court is called upon to determine the amount of compensation is the date on which it comes to the conclusion that the landlord is entitled to vacant possession of the premises, and it is at this stage that the Court is under a duty to pass what is called an interim order declaring the amount so found due, and directing its payment within three months from the date. This obviously amounts to a conditional order in the sense that, if the amount is deposited as directed the landlord would be entitled to vacant possession, and, if he fails to make the deposit his application for ejectment would stand dismissed. The provisions of the Act do not contemplate an order, determining compensation, and directing its payment at any point of time anterior to the determination of the ejectment application itself. Even an application proceeding from a party, plaintiff or defendant is uncalled for in a matter which comes within the scope of section 4 (2) of the City Tenants' Protection Act. The Court is under a mandatory duty in such cases to determine the compensation and make an order in terms of the section. It is clear, therefore, that the order dated the 19th August, 1958, when the Courts had not thought fit to come to a decision as to the right of the plaintiff-landlord to vacant possession, was wholly beyond the jurisdiction of the Court.

The proper order under section 4 (2) of the Act is one made when the Court decides that the landlord is entitled to a decree for vacant possession. The order that was made in this applications, the one dated 21st September, 1959, did not incorporate any determination of the compensation or its payment into Court, as required by section 4 (2). At the stage of disposal of the application for eviction, this matter appears to have been completely lost sight of by the trial Judge. It is clear, therefore, that the Court has failed to discharge a duty that has been statutorily laid upon it.

The result is that the order of the lower Court has to be set aside, and the suit remanded for determination afresh of the only surviving question of the quantum of compensation payable to the defendant and for passing orders in terms of section 4 (2). Whether the quantum of compensation, already determined in 1958, is to prevail or is to be determined afresh, is a matter for the lower Court to decide.

The petition is allowed. No order as to costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHAMED KUTTI.

Abdul Muthaliff .. *Petitioner**

v.

Saidoon Bibi .. *Respondent.*

Madras Cultivating Tenants' (Payment of Fair Rent) Act (XXIV of 1956), *section* 15—*Exemption under—Land used during the period for raising betel vines—Test.*

The exemption of any land under section 15 of the Madras Cultivating Tenants' (Payment of Fair Rent) Act, 1956 from the operation of the Act would come into play only if the land is used for raising the crops mentioned therein during the period when such land is used for raising as main crop betel vines, etc. The expression " during the period " could have reference only to the period when such crops are actually raised and not to the initial period of the lease. There is nothing under the Act precluding a tenant from using his holding for cultivation of any kind of crop provided it is agricultural or horticultural. Where it is established that only paddy is being cultivated in a land, the mere fact that at an earlier period the land was used for cultivation of betel vines will not take the land out of the provisions of the Act :

Petition under section 11 of the Madras Act XXIV of 1956, praying the High Court to revise the Order of the Court of the Rent Tribunal (District Munsif, Udumalpet) dated 3rd June, 1959 in R.A. No. 15 of 1958 (R.C.P. No. 40 of 1957, Rent Court, Udumalpet).

S. Mohan and *C. D. Sekkizhar*, for Petitioner.

P. S. Balakrishna Ayyar and *P. S. Ramachandran*, for Respondent.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition arises out of an application filed by the petitioner herein under section 9 of the Madras Cultivating Tenants' (Payment of Fair Rent) Act (XXIV of 1956) for fixing the fair rent of his holding comprising an extent of 1-03 acres in S. No. 228 and 0-42 acres in S. No. 243-B in Sholamdevi village classified as double crop wet land. The Rent Court fixed the fair rent at 4/5 salagais of paddy per acre for the first crop and 4 salagais of paddy for the second crop and 20 bundles of straw for both the crops. On appeal the Rent Tribunal set aside the order of the Rent Court and dismissed the application holding that the land in question is *kodikal* land used mainly for cultivation of betel vines and therefore exempt under the provisions of section 15 of the Act. Hence this Civil Revision Petition.

The short point for consideration is whether the land in question is one used for raising as main crop betel vines and is, therefore, exempt from the operation of the provisions of section 9 by reason of section 15 of the Act.

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* C.R.P. No. 2138 of 1959. 5th December, 1960.
(24th Agrahayana, 1882, Saka.)

Section 15, so far as it is relevant for the present purpose runs thus :—

"Nothing in this Act shall apply to any land during the period when such land is used for raising as main crop, sugarcane, plantain or betel vines."

The petitioner has been a lessee of the lands from 1954 and the evidence is that even after the lease, he has been cultivating the land only with paddy crops. It would appear that a prior tenant, one Chakrai Kader Rowther used to cultivate the land with betel vines. The Rent Court on a discussion of the evidence on both sides found that the case does not fall under section 15 of the Act. The Rent Tribunal, on the other hand, took the view that inasmuch as the tenant intentionally cultivated the land with paddy crops and converted the land into a regular paddy field in order to claim the benefit of the Cultivating Tenants' Protection Act his conduct lacked good faith and that since the land is only *kodikal* land used for cultivation of betel vines, it should be deemed to be only betel vines land coming under the exemption contemplated by section 15 of the Act.

It is common ground that after the petitioner became a lessee he has been cultivating the land only with paddy, though there is evidence to show that formerly the land was used for raising betel. "Cultivation" as defined in the Madras Cultivating Tenants' Protection Act (XXV of 1955) means the use of lands for the purpose of agricultural or horticultural. So far as I am able to see there is nothing in the Madras Act XXIV of 1956 to preclude a tenant from using the holding for cultivation of any kind of crop provided it is agricultural or horticultural. If the use is not for purposes agricultural or horticultural, the landlord has a remedy under section 3 of the Madras Act XXV of 1955. Again under section 6 of the Madras Act XXIV of 1956, where in respect of any land fair rent has been fixed, it would be open to either party to apply to the Rent Court for refixing of fair rent after a period of 5 years. In the circumstances, the observations of the Rent Tribunal that :

"If the tenant might have cultivated or acted properly, according to his lease contract, at the time of the filing of the petition, it would be betel vine land coming under the exemption under section 15 and he could not have filed the petition for fixation of fair rent at all"

on which he appears to have rested his conclusion in this case are beside the point. There can be no doubt on the evidence on record that the land is now being used for raising paddy crops. Exemption from the operation of the Act in respect of a particular holding would come into play only if any land "during the period when such land is used for raising as main crop betel vines". The words "during the period" in section 15 has not been defined in the Act to give them a special meaning. On the plain language, they can have reference only to the period during which such of the crops as are contemplated under section 15 are raised and not necessarily to the initial period of the lease. As I pointed out there is nothing in the Act precluding a cultivating tenant from raising one crop rather than another provided it is of an agricultural or horticultural nature. Nor can he be denied the right to get fair rent fixed under the Act in respect of his holding, the said right being notwithstanding any agreement between a land-owner and the cultivating tenant or any decree of a Court. On the facts of this case, I am inclined to agree with the Rent Court that the exemption under section 15 of the Act is not applicable and hold that the reasoning of the Rent Tribunal to bring the case under the said section 15 is untenable.

In the result the Civil Revision Petition is allowed, the order of the Rent Tribunal is set aside and the Order of the Rent Court is restored with costs of the petitioner, throughout.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

A. S. P. A. Arumuga Chettiar and another .. *Appellants**

v.

Kuppuswami Chettiar .. *Respondent.*

Deeds—Construction—Release deed—If and when could be construed as conveyance.

Even though a deed may be styled as a ' release deed ' if the intention to transfer any right of the executant in the subject-matter of the deed is clear, the document could be treated as a conveyance effectively transferring the rights of the executant.

Appeal against the decree of the Court of the Subordinate Judge, Vellore, in Original Suit No. 25 of 1955.

T. K. Subromania Pillai, for Appellants.

T. R. Ramachandran and *V. S. Ramakrishnan*, for Respondent.

The Judgment of the Court was delivered by

Kailasam, J.—This appeal arises out of a suit instituted by the plaintiff against the appellants herein for setting aside a registered release deed dated 25th February, 1952 executed by the plaintiff in favour of the defendants and for declaring that the same is void and inoperative, and for directing the defendants to deliver possession of the properties and for accounts.

The appellants (defendants) are the grandsons of one A. S. Ponnuswamy Chettiar by his son Kannappa Chettiar. One Kannammal's father, Kumaraswamy Chettiar and the said Ponnuswamy Chettiar's father Subbaraya Chettiar and one Arunachala Chettiar were brothers. Arunachala Chettiar died without leaving any issues. Kumaraswamy Chettiar had one son Sonachala Chettiar and two daughters Bagiammal and Kannammal. Bagiammal died issueless during the lifetime of Kumaraswamy Chettiar. Sonachala Chettiar was insane and died unmarried. Kannammal became a widow at an early age and she also had no issues. The plaintiff claims the suit property through Kannammal, who is his father's brother's wife. Kannammal died issueless on 1st February, 1952 and the plaintiff being the nearest heir became entitled to the properties. At the time of her death O.S. No. 24 of 1953, a suit filed by the defendants in January, in the Sub-Court, Vellore, for recovery of the suit properties from Kannammal, who was impleaded as one of the defendants, was also pending. The plea of the appellants (plaintiffs in O.S. No. 24 of 1953) was that the properties now in dispute were bequeathed by their grandfather Ponnuswami Chettiar in favour of Kannammal on 9th August, 1931 with a view to save the properties from the wasteful habits of his son Kannappa Chettiar and that the bequest was not binding on them. On 25th February, 1952 a registered release deed, Exhibit B-1 was executed by the plaintiff herein in favour of the defendants. In the release deed Exhibit B-1 it is recited that the properties were given to Kannammal by Ponnuswamy Chettiar, that as the properties were not given from the plaintiff's family and as the plaintiff did not want any properties, which were not given from his family, though he was the nearest reversioner, he was releasing all his rights. This document was registered on 26th February, 1952. On 26th February, 1952 the defendants herein (appellants in O.S. No. 24 of 1953) filed I.A. No. 144 of 1952 stating that they have obtained a release deed from the plaintiff and that therefore the properties that belonged to Kannammal might be removed from the scope of the suit and that the plaint might be modified accordingly.

The defendants filed O.S. No. 174 of 1953 on the file of the District Munsif Court of Tiruvannamalai against a debtor of the estate of Kannammal impleading the plaintiff herein as the 2nd defendant. The plaintiff (defendant in O.S. No. 174 of 1953) filed a written statement which is marked as Exhibit B-2 in this suit.

* Appeal No. 8 of 1957. 12th December, 1960.
(21st Agrahayana, 1882, Saka).

The plaintiff contended that the release deed Exhibit B-1 was not a family settlement but was only a release deed and that the release deed was not supported by consideration. The suit out of which this appeal arises was filed on 31st January, 1955.

The contention of the plaintiff is that he executed Exhibit B-1 on the representation that it was a document which merely clothed the defendants with the authority to manage and consolidate the estate on his behalf, that he never intended to relinquish his rights in the properties, that he had never entertained even to the remotest degree any such idea, that the document was obtained by the defendants fraudulently by false representations and deceit, that at the time he subscribed his signature to the document he was not aware that the document was a deed of release but he believed the representations of the defendant that it was a mere document empowering the defendants to manage his estate, that the release deed was not a voluntary document executed by the plaintiff of his free will and consent but was executed as a result of fraudulent misrepresentation and deceit practised by the defendants and their father.

The case for the defendants is that the properties originally belonged to their grandfather Ponnuswamy Chettiar, that he with a view to save them from the wasteful habits of his son Kannappa Chettiar, father of the defendants, executed a will in favour of Kannammal of the suit properties and that that bequest was sham and nominal. According to the defendants, after the death of Kannammal at the time of her *karumadhi* there was a Panchayat and panchayatdars settled the disputes by deciding that the defendants should get all the properties given to Kannammal under the will and that the defendants should pay a sum of Rs. 1,500 to one Kumaraswamy Chettiar by way of grace, a release deed was executed by the plaintiff in pursuance of the panchayat, and, it is false to state that the document was obtained fraudulently or by false representation. The defendants also contend that in pursuance of this release deed they paid Rs. 1,500 to Kumaraswamy Chettiar and the release deed was acted upon.

The learned Subordinate Judge found that the plaintiff was able to make out a case of misrepresentation and held that the plaintiff did not relinquish his rights. He also found that Exhibit B-1 was not acted upon and decreed the suit.

In the appeal before us the learned counsel for the appellants contends that Exhibit B-1, the registered release deed, is a valid document, that it was executed and registered by the plaintiff with the full knowledge of its contents, that it was acted upon and that it is binding. The 1st defendant has examined himself as D.W. 1. The defendants have also examined D.Ws. 2 to 5 in support of their case. The 1st defendant as D.W. 1 deposes that the panchayat decided that the plaintiff should execute a release deed and that the defendants should pay Rs. 1,500 to Kannuswamy Chettiar. He also deposes to his filing a petition, Exhibit B-4 for removal of the properties belonging to Kannammal from the suit O.S. No. 24 of 1953. He states that in pursuance of the release deed he paid Kannuswami Chetti. He deposes that after the panchayat a draft was prepared by vakil Nagaswamy Iyer, that he, the plaintiff, P.W. 2 and others went to the vakil and got a draft from the vakil, that the plaintiff and P.W. 2 took the draft to Tindivanam Vakil, that after some amendment the release deed was executed and that it was registered. D.Ws. 2 to 5 state that they attested Exhibit B-1. They depose that Exhibit B-1 is a release deed and that the plaintiff knew it to be a release deed. D.W. 3 was also one of the panchayatdars. He stated that he attended Kannammal's funeral and *karumadhi*, that the plaintiff was also present, that he settled their litigation, that they all went to the vakil to write a document at Tiruvannamalai, that a draft was written and given to the plaintiff, that the plaintiff took it to Tindivanam to consult his lawyer, that the plaintiff came on the next day to Tiruvannamalai and signed it and that the plaintiff knew it to be a release deed. We do not find anything in the cross-examination which discredits the testimony of this witness. He was asked whether he would give his properties to any one and he stated that he would not

give his properties to any one. He stated in cross-examination that though they talked that the defendants have filed a suit against others and the plaintiff, they did not refer to it in the document. The credibility of this witness is in no way affected in cross-examination. As already stated, D.Ws. 2, 4 and 5 are the attestors. D.W. 4 identified the plaintiff before the Sub-Registrar. They speak to the execution of the document by the plaintiff and the fact that the document is a release deed. We do not find any grounds for discrediting their testimony.

On the side of the plaintiff, the plaintiff has examined himself as P.W. 1. He has examined P.W. 2 in support of his case. P.W. 2 is an attestor of Exhibit B-1. He deposes that as he was passing along the street Kannappa and Vasudeva Chetty called him to attest Exhibit B-1, that he asked them why he should attest, that they replied that it was a power document and that he did not read Exhibit B-1. In cross-examination this witness stated that he did not know what was meant by power, that the two persons (obviously meaning Kannappa and Vasudeva Chetty) said power, that four or five other persons who were also present, said so. The evidence of this witness does not impress us very much. The plaintiff as P.W. 1 states that Kannammal died on 1st February, 1952 and that he came for her *karumadhi*. According to him, the defendants, their father Balu Chetty and Gopala Chetty stated that the properties should be managed and wanted a document, he agreed to give a power document and he did not release his rights. The plaintiff admits his signature in Exhibits B-1 and states that Exhibit B-1 was written on 25th February, 1952 and registered on 26th February, 1952, that he signed the document, Exhibit B-1 believing that it was a power document and that only after getting the summons in O.S. No. 174 of 1953 he came to know that the defendants got a release deed executed from him. In cross-examination he has admitted that he pays income-tax, that he filed suits in Cuddalore Sub-Court and in Tindivanam District Munsif's Court, that he has properties in seven or eight villages, that he rides a motor cycle and that he had a licence for working as Pawn Broker. When questioned about Exhibit B-2, the written statement he filed sn O.S. No. 174 of 1953, he stated that he instructed his vakil that Exhibit B-1 was taken from him by fraud and that he did not observe if he has mentioned in the written statement. He denied any panchayat or his going to Vakil Nagaswamy Iyer.

On the evidence it is very clear that plaintiff is a man owning considerable properties and is capable of managing his own affairs. He is an income-tax assessee and has filed several suits in Cuddalore Sub-Court and Tindivanam Munsif's Court. He has a licence for working as a Pawn Broker. With such considerable experience of the world the burden is very heavily on him to explain how he signed and got registered Exhibit B-1 without knowing its contents. The attestors and one of the panchayatdars support the defendant's case that the plaintiff executed the document Exhibit B-1 knowing it to be a release deed. On the very same day, *i.e.*, on 26th February, 1952 the defendants have filed Exhibit B-4, exhibited in I.A. No. 144 of 1952 in O.S. No. 24 of 1953 stating that they have obtained the release deed from the reversioner of Kannammal, who claimed title to the properties and prayed for the release of the properties of Kannammal from the plaint. In the written statement filed by the plaintiff in O.S. No. 174 of 1953 he states that Exhibit B-1 is not a family settlement but a release deed and that the release deed is not supported by consideration. In the written statement he does not allege that he executed Exhibit B-1 thinking that it was a power document and that he did not know the contents of the document. Apart from his own interested evidence and that of P.W. 2, there is nothing to prove that he executed the document Exhibit B-1 thinking that he was executing a power document.

It is no doubt strange that the plaintiff should relinquish his rights to property worth about Rs. 20,000 or Rs. 25,000 without any consideration ; but that one circumstance cannot by itself establish that the plaintiff did not know that Exhibit B-1 was a release deed when he signed. As it is recited in Exhibit B-1, the plaintiff might have released the rights in the properties, because originally the properties did not belong to his family. The plaintiff himself was very rich. The suit in O.S. No. 24 of 1953 in which the will in favour of Kannammal was questioned was

also pending. In the circumstances it cannot be said that the release deed is unnatural.

The learned Subordinate Judge observes that the defendants cannot explain why the plaintiff released his rights to the properties and that there is no reference to the panchayat and its decision in the recitals in Exhibit B-1. The absence of recitals about the panchayat in Exhibit B-1 by itself cannot disprove the panchayat. It may be that at the time of drafting the release deed they did not think it necessary to include these recitals. The learned Subordinate Judge posed the question whether it was a fair document and proceeded on the basis that the defendants should prove that the transanction was above board. We are of the view that the burden is on the plaintiff to prove that when he executed the document he did not know that it was a release deed. The learned Subordinate Judge finds that the plaintiff is a person capable of managing his own affairs and is able to follow his vocation in life, and if he executed Exhibit B-1, it should have been only for the management and not for relinquishing his rights. We agree with the findings of the learned Subordinate Judge that the plaintiff is a person capable of managing his own affairs and to follow his vocation in life, but we do not agree with his conclusion that Exhibit B-1 should have been executed only for the management and not for relinquishing his rights. The learned Subordinate Judge was in error in attaching undue importance to the fact that the release deed was not supported by consideration and that there is no convincing explanation as to why the plaintiff should release his interest in substantial properties. As pointed out by us earlier, it is necessary to establish that the plaintiff signed Exhibit B-1 without knowing its contents.

The learned counsel for the plaintiff-respondent contends that even if Exhibit B-1 is held to have been executed by the plaintiff knowing its contents it will not be valid as a release deed. He submits that the release deed is not supported by any consideration and a release to be effective must be in favour of a person who has already a right and that the effect of a release should be to enlarge the already existing right and will not have the effect of transferring title. The learned counsel relied on a decision of a Bench of this Court reported in *S.P. Chinnathambiar* v. *V.R.P. Chinnathambiar*[1]. The case was an appeal from the Special Tribunal under section 51 of Madras Act XXVI of 1948. The Zamindar of Sivagiri relinquished the impartible zamindari of Sivagiri in favour of his two sons. The relinquishment deed provided that the zamindar relinquished the zamidari and his right in favour of the remaining members of the coparcenary and declared that the eldest son would become presently the holder and proprietor of the said impartible zamindari and that he had no further right in the said impartible estate. Their Lordships at page 391 of the judgment observe as follows :—

> " If therefore the first appellant had no title to the property at the time of the renunciation except the off-chance of succeeding by survivorship to the estate after the death of his father, the renunciation or relinquishment under the deed would not clothe him with any title to the property. Renunciation must be in favour of a person, who had already title to the estate, the effect of which is only to enlarge the right. Renunciation does not vest in a person a title where it did not exist and therefore the deed would be inoperative to make the first appellant the owner of the impartible estate of Sivagiri."

Their Lordships were considering the case of a relinquishment of an impartible estate. The relinquishment of an impartible estate is prohibited under the Court of Wards Act. Their Lordships further observe :

> " If on the other hand the document conveys or transfers property, it will be hit at by section 34 of the Court of Wards Act. The learned counsel for the first appellant therefore did not contend that the document constitutes a deed of transfer though it was the view taken by the Tribunal. It is unnecessary for use to express any opinion whether the document in fact conveys any title as the first appellant did not contend before us that it did convey title to him."

It is very clear from the decision that their Lordships were not considering the release deed as a deed of transfer and as such cannot be an authority for this case. The learned counsel for the respondent also relied on a decision reported in *Hutchi*

1. (1953) 2 M.L.J. 387.

Gowder v. *Bheema Gowder*[1]. The facts of the case are : The plaintiff and the defendant entered into an agreement on 13th September, 1946, that the vendor will execute and register a proper and valid conveyance. In July, 1949, the plaintiff-vendee and the defendant-vendor agreed that in the place of the conveyance he would execute a release deed. On 30th October, 1949, the vendor executed a release deed but he defaulted in getting the deed registered. The release deed contained a clause

> " the releasor hereby assures and declares that, whenever called upon by the releasee the releasor will do sign and execute the deeds and writings for better securing the estate."

The vendee filed a suit on 30th October, 1952, praying for a decree directing the vendor to execute and register a deed of release or in the alternative an instrument of conveyance. At page 337 their Lordships observe :

> " The plaintiff's learned counsel in the lower Court appears unfortunately to have failed to tell the learned Subordinate Judge that a release deed would not be effective to transfer title........ Title to that share could hence be acquired only by a proper deed of conveyance or by adverse possession........In order that title to the estate might be secured to him, it was necessary that he should have a proper deed of conveyance."

These observations are relied on by the learned counsel for the respondent to support his case. The release deed in that case was invalid as it was not registered. What would have been its effect if it had been registered, did not arise for consideration. Exhibit B-1 specifically states that the plaintiff has no right at all in the properties as well as outstandings belonging to Kannammal and that the defendants will be entitled to enjoy the properties without any objection whatsoever and with all rights. The effect of this deed is to operate as transfer of whatever rights the plaintiff had to the defendants. In *Doraiswami Pilla* v. *Chinnia Goundan*[2], their Lordships observed that a document, though styled as a release deed, can be treated as a conveyance if it appears clearly that the intention of the executant of the document was to transfer his rights. In that case the plaintiff brought a suit for redemption of a mortgage executed by the widow of the last male owner, alleging that he was the son of a person adopted by the widow. The defendants in their written statement questioned the legality of the adoption of the plaintiff's father, whereupon the plaintiff obtained a conveyance of all his rights from the person who, but for the adoption, would be the heir of the last male owner on the death of the widow in the year 1902. The release deed was executed in favour of the plaintiff by the person who was the heir of the last male owner on the death of the junior widow in 1902, if there was no adoption of the plaintiff's father. That document was entered into between the plaintiff who with his father before him, had been in possession of the estate for a great many years on the footing of the adoption and the person who was entitled to succeed in 1902 if there was no adoption. By that document the heir released all his rights in favour of the plaintiff. The Subordinate Judge held that the release deed does not purport to be and is not a conveyance. Their Lordships at page 261 of their judgment observe as follows :

> " The word used is ' release ' but the intention to transfer any rights which the executant of the document has is clear and we see no sufficient reason why it should not be treated as a conveyance."

We respectfully agree with the above decision which is an authority for the proposition that even though the word ' release ' may be used, if the intention to transfer any rights which the executant of the document had is clear, the document can be treated as a conveyance. Therefore, we find there can be no objection to treat Exhibit B-1 as a deed of conveyance effectively transferring title to the first and second defendants. Further, we are of opinion that the plaintiff after executing Exhibit B-1 is disentitled to sue, having given up his rights in the property. In the circumstances we set aside the judgment of the learned Subordinate Judge and allow the appeal with costs throughout.

R.M. *Appeal allowed.*

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1. (1959) 2 M.L.J. 324. 2. (1917) 34 M.L.J. 258.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

The Indian Bank, Ltd., Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), *section* 8, *Proviso, (before* (1956) *amendment)—Scope—Claim for deduction of entire interest paid by the bank on fixed depoits under section* 10 (2) *(iii) or* (2) (xv)*—Taxability—Whether the deposit on which interest was paid by the bank amount to " capital borrowed or money borrowed for the purpose of investment".*

In the case of a bank, the deposit it receives in the normal course of its business would be monies borrowed for the purpose of the banking business it carries on. It would be capital borrowed within the scope of section 10 (2) (iii) of the Income-tax Act. Where section 10 (2) (iii) applies to the interest paid on such deposits, the application of the general provision in section 10 (2) (xv) would stand excluded.

Even if the bank had acquired the Mysore Securities from out of the funds on which interest charges were paid in the year of account 1951-52, the fact that the income from the Mysore Securities was not taxable did not make the interest charges any the less trading exepnses of the Bank, expenses for the deduction of which, in computing its business income section 10 (2) (iii) provides.

No portion of the interest paid in 1950 was on money borrowed for the purpose of investment in securities within the meaning of the Proviso to section 8 of the Act. Where interest charges are to be deducted under section 10 (2) (iii) there can be no apportionment on the basis, that a portion of the income resulting from the trading activities of the assessee was tax free. Hence the entire " interest paid by the Bank in the year of account 1951-52" is a permissible deduction under section 10 (2) (iii) of the Act.

Case-law discussed.

Chellappa Chettiar v. *Commissioner of Income-tax,* (1937) 1 M.L.J. 351 : I.L.R. (1947) Mad. 734 : 5 I.T.R. 97, followed.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench ' A ' under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922) in R.A.No. 351 of 1958-59 (I.T.A.No.2820/57-58-Assessment year 1951-52 on its file for decision on the following question of law *viz.,*

" Whether on the facts and circumstances of the case the Bank was entitled to claim the deduction of the entire interest paid by it on fixed deposits, either under section 10 (2) (iii) or 10 (2) (xv) ? "

R. Venkataraman, for Applicant.

S. Ranganathan, for Special Counsel for Income-tax on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The relevant facts were never in dispute. The year of account, with which we are concerned in this reference ended on 31st December, 1950. The corresponding assessment year was 1951-52. The assessee Bank paid to its constituents in the year of account Rs. 25,91,565 as interest charges on the various deposits received by the Bank in the normal course of its banking business. No amount was borrowed in that year or in the past for the express purpose of buying securities or investment in securities. In the course of its normal banking business the Assessee Bank bought, held and sold securities including Mysore securities the income from which was tax-free. The interest, it received on all the securities it held was brought to account as receipts. The money deposited by the constituents as well as the securities bought and held by the Bank thus constituted the stock-in-trade of its banking business. Up to the assessment year 1951-52 the entire interest charges paid by the Bank were deducted, apparently under section 10 (2) (iii) of the Income-tax Act, in computing its taxable income, and no attempt was made to apportion those charges on the basis that a portion of the monies borrowed by the Bank had been utilised for the purchase of or investment in securities, the income from which was tax free. In the year of account 1950, the Bank received in the usual course interest on the Mysore Government Securities it held, which interest was tax free. In

* T.C. No. 41 of 1959.

9th November, 1960.
(18th Kartika, 1882, Saka).

the same year it sustained a loss of Rs. 6,616 in the sale of some of these Mysore Securities. That was allowed as an item of expenditure under section 10 (2). Out of the total sum of Rs. 25,91,565 paid in the year of account as interest charges, a sum of Rs. 2,80,194 was apportioned by the Department as the interest payable on the portion of the borrowed monies, that is, deposits of various kinds, computed and deemed to have been utilised for the purchase of these tax free Mysore Securities. The average value of the holdings in the Mysore Securities in the year of account was worked out at a little less than two and a half crores of rupees. The Department took the view, that nothing should be deducted under the Proviso to section 8 of the Act if it was interest paid on monies borrowed for investment in tax free securities, that is, securities interest on which was exempt from liability to income-tax under the provisions of the Act. Rs. 2,80,194 was therefore disallowed in deducting the interest charges of the year. That disallowance was confirmed by the Appellate Assistant Commissioner and by the Tribunal to whom the Assessee Bank successively appealed.

The Tribunal referred the following question to this Court under section 66 (1) of the Act:

"Whether on the facts and circumstances of the case the Bank was entitled to claim the deduction of the entire interest paid by it on fixed deposits, either under section 10 (2) (iii) or 10 (2) (xv)?"

The relevant portion of section 8, as it stood in the assessment year 1951-52 with which we are now concerned was:

"The tax shall be payable by an assessee under the head 'interest on securities' in respect of the interest receivable by him on any security..........

provided that no income-tax shall be payable under this section by the assessee in respect of any sum deducted from such interest by way of commission by a banker realizing such interest on behalf of the assessee or in respect of any interest pyable on money borrowed for the purpose of investment in the securities by the assessee................"

The Finance Act, 1956 amended section 8 with effect from 1st April, 1956. For the words in the First Proviso to section 8

"in respect of any sum deducted from such interest by way of commission by a banker realizing such interest on behalf of the assessee'"

the Finance Act substituted

"in respect of any reasonable sum expended by him for purposes of realizing such interest."

We have referred to this amendment merely for the sake of completeness, though it has no bearing on the determination of any of the questions at issue. The Finance Act of 1956 added an *Explanation* to section 8 consisting of sub-clauses (*a*) and (*b*). Sub-clause (*b*) of the *Explanation*, which is relevant for our purpose, ran:

"In the case of a banking company.............

(*b*) money borrowed shall include monies received by way of deposits and that amount which bears to the amount of interest payable on monies borrowed the same proportion as the gross receipts from interest on securities (inclusive of tax deducted at source) chargeable to tax under this section bears to the gross receipts from all sources which are included in the profit and loss account of the company, shall be deemed to be interest payable on money borrowed for the purpose of investment in the securities by the assessee, and the amount of such interest for which allowance is due under sub-section (2) of section 10 shall be reduced correspondingly."

The position thus was that even in the case of a banking company there was no express statutory provision for any apportionment of interest payments before *Explanation* (*b*) was added to section 8 in 1956. Nor was there any express provision for apportionment on the distinction between securities the interest on which was liable to be taxed and securities which were tax free. The Courts, however, held that monies borrowed for purposes of investment in tax free securities lay outside the scope of the *Proviso* to section 8.

The Departmental instructions in force in the relevant assessment year ran:

"When a Bank or other concern engaged in business similar to that of a Bank receives deposits on account of loans in the course of its business and invests the money so borrowed as occasion arises the entire interest on such borrowings will be allowed as a deduction against its entire income liable

to tax without attempting at allocation of the borrowed money to investments in tax free and other securities. When, however, there is a definite proof (not a mere inference) that a certain sum was specifically borrowed by a Bank or similar concern for the purpose of investment in tax-free securities and has been so invested, the interest on money so borrowed will be set off against the interest on the tax free securities only.'

The *Proviso* to section 8 is a specific provision for the deduction of interest paid on monies borrowed for investment in securites. While section 10 (2) (iii) is a specific provision for deduction of interest paid on monies borrowed for purposes of the business of the assessee, section 10 (2) (xv) is a general provision for deduction of expenses incurred by an assessee wholly and exclusively for his business. The learned counsel for the assessee claimed that interest paid by a bank on the deposits it receives in the usual course of its banking business fell not within the scope of section 10 (2) (iii) but within that of section 10 (2) (xv). The further contention was that if deposit did not constitute capital borrowed within the meaning of section 10 (2) (iii) it could not be money borrowed within the scope of the *Proviso* to section 8 as as it stood before it was amended in 1956 by the addition of the *Explanation.* We are unable to accept the contention, that the deposits received from its constituents did not constitute borrowed monies in the hands of a bank. In relation to its constituent whose deposit is received the bank is in the position of a debtor, subject to the liability to repay the amount in accordance with the terms of the contract, and also subject to the liability to pay the contract rate of interest. In the case of a bank the deposit it receives in the normal course of its business would be monies borrowed for the purposes of the banking business it carries on. It would be capital borrowed within the scope of section 10 (2) (iii). If section 10 (2) (iii) applies to the interest paid on such deposits, the application of the general provision in section 10 (2) (xv) would stand excluded.

The real question we have to decide in this case, is, whether the sum in question Rs. 2,80,194, represented or must be deemed to represent interest paid on monies borrowed by the Bank for purposes of investment in the Mysore securities within the scope of the *Proviso* to section 8 as it stood in the assessment year 1951-52 or whether it was but a part of the interest paid on capital borrowed by the Bank for purposes of its business within the scope of section 10 (2) (iii). We shall confine ourselves to a determination of that question. And we should like to set out even at the outset that nothing we say should be construed as an attempt to evolve a formula for universal application, in delimiting the respective fields in which *Proviso* to section 8 and section 10 (2) (iii) operate..

We have already pointed out that the Bank received its deposits in the usual course of its banking business, and that it did not borrow any amount for the express purpose of investment in securities in general or in the Mysore Securities with which we are concerned now. The monies deposited with the Bank by its constituents merged with its general funds, and practically all the monies in the hands of the Bank constituted its stock-in-trade or circulating capital. So did the securities which it purchased and held from time to time, including the Mysore Securities. The securities were purchased for the purpose of the banking business, the Bank carried on and in the normal course of its banking business. Whether money borrowed by a bank for the express purpose of buying securities as part of its stock-in-trade would make it money borrowed for investment in securities within the scope of the *Proviso* to section 8 as distinguished from capital borrowed for purposes of business and therefore within the scope of section 10 (2) (iii) does not arise for consideration in this case, and we should not be taken as recording in this judgment any opinion of ours on that issue. All that is necessary for us to decide is where the Bank received deposits in the course of its normal banking business, and where it purchased securities from its funds which included such deposits, neither the original deposit by the constitutent nor that deposit taken in conjunction with the transaction of purchase of securities can be viewed as a transaction of borrowing money for the purpose of investment in securities within the meaning of the *Proviso,* to section 8 as it stood in the year of assessment 1951-52, even if the purchase of the securities was subsequent to the receipt of the deposits on which interest was paid. We see no basis for construing the statutory expression

in the *Proviso*, to section 8, as it stood in the relevant year without the statutory explanation,

> " money borrowed for the purpose of investment in securities by the assessee " to mean " money borrowed by the assessee who invested in securities his money inclusive of the money that he had borrowed. "

We emphasise that we are concerned only with an assesee who carried on a banking business, and who borrowed money, in the course of and as incidental to carrying on his normal banking business, and who independent of the transanctions of borrowing, purchased securities, again in the course of his normal banking business. If the borrowing and the investment in securities were independent transactions, each undertaken in the course of the normal business of the bank, it should be obvious that it would not be a case of borrowing for the purpose of investment in securities. It would really be a case of borrowing for the purpose of the business, the banking business. Therefore, neither the receipt of the deposits nor the payment of interest on deposits brought the assessee before us within the scope of the *Proviso* to section 8, as it stood before the *Explanation* was added in 1956, though factually the assessee had purchased securities, interest from which, had it been taxable, would have to be computed for the purpose of taxation only under section 8 of the Act.

This conclusion of ours, based on the language of the *Proviso* to section 8 before the addition of *Explanation* (*b*) to section 8 in 1956, is strengthened by the legal fiction enacted by that *Explanation*. What was deemed by implication to be money borrowed for the purpose of investment in securities was not in fact money borrowed for that purpose before the enactment of the legal fiction. But for that legal fiction, how can holding of securities purchased, let us assume, in 1949 be correlated to deposits received in 1950, and how can the deposits received in 1950 be viewed as monies borrowed for the purpose of investment in those securities? It was the average holding of the Mysore Securities in the year of account 1950 that was taken into consideration for apportioning the interest charges, independent of the date of the acquisition of these securities. There was nothing to show that any portion of the interest charges paid in 1950 related to deposits that preceded the purchase of the Mysore Securities which the Bank held in 1950. It should be obvious that in the case of a bank deposits are of a comparatively short duration. So the interest charges incurred in 1950 should normally have related mostly to deposits made that year or in the year before. We have said that there was nothing to show that these deposits were utilised to purchase these securities. The deposits on which interest charges were paid by the Bank in 1950 could not be viewed as money borrowed for the purpose of investment in the Mysore Securities held by the Bank in 1950.

In the absence of direct authority of any decided case, interpreting the statutory expression in the *Proviso* to section 8, " money borrowed for purposes of investment ", we have examined its scope on the language of the statute. We shall now examine the cases to which we were referred, to show that we could find nothing in them to militate against the interpretation we have placed on that statutory expression.

In *United Commercial Bank, Ltd.* v. *Commissioner of Income-tax*[1], the Supreme Court reaffirmed that the heads of income in section 6 are mutually exclusive. Therefore, in the case of an assessee who carries on a banking business his income from securities can be computed and taxed only under that head and under section 8, even though the securities form part of the stock-in-trade of the banking business of that assessee. But there was no occasion for the Supreme Court to examine in that case the scope of the *Proviso* to section 8 and determine what constituted money borrowed for the purpose of investment in securities as distinct from money borrowed for the purpose of the assessee's banking business. Whether any apportionment of the interest charges incurred by a bank was permissible in computing its income from securities under section 8 and its business income under section 10 did not arise for consideration either in that case.

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1. (1958) S.C.J. 46 : (1958) 1 M.L.J. (S.C.) 26 : (1958) 1 An.W.R. (S.C.) 26 : 32 I.T.R. 688.

The decision of the Court of Appeal in England was reported at page 541 as *Hughes (Inspector of Taxes)* v. *Bank of New Zealand*[1]. The decision of the House of Lords confirming that of the Court of Appeal was reported in the same volume at page 636 as *Hughes (Inspector of Taxes)* v. *Bank of New Zealand*[2].

The relevant facts in the *Bank of New Zealand case*[1], were as follows: A bank registered and resident in New Zealand was assessed to income-tax for the year 1927-28 under Case I of Schedule D in the sum of £ 94,448 on the profits arising from the business of its London branch, the assets of which included holdings of tax free securities. The tax free securities had all been purchased partly out of the floating capital of the branch and partly out of the monies obtained in New Zealand, to borrow which it had expended £41,262. In the period in question, these holdings produced £ 78, 556 interest. The Court of Appeal held that this interest receipt was tax free. The Court of Appeal further held that though this interest was exempt from taxation, the bank was entitled for purposes of assessment to include in its trading expenses, to be deducted from profits, the sum of £ 41, 262, as expenses particularly attributable to earning it. Lord Wright said at page 566:

"The expenses which are dealt with here by the Commissioners are interest on the money borrowed and used to purchase these particular securities, and it would be a suitable conclusion if that could be deducted. . . . .The case for the Crown can, I think, be put most forcibly in this way, that this particular sum of £78,000 odd is to be taken out of the trade altogether, and treated as if it had never been there at all. It can be out of the computation and along with it the cost of earning it should also be excluded, and in that way the trade from both points of view would be considered as if there never had been any such profits at all. But I cannot find in the Act anywhere any provision which would justify any such elimination of a part of the expenses, where, as here, there is only one indivisible trade. . . . . . There is only one trade and we know exactly what are the expenses of that trade, and rule 3 (*a*) of the Rules applicable to Cases I and II of Schedule D provide that the expenses of the trade, if the "money is wholly and exclusively laid out for the purposes of the trade", are to be deducted. The result seems to be that the Legislature in the Income-tax Acts has expressly provided for certain exemptions and exclusion which will operate when the profits of the trade are being dealt with under Case I of Schedule D, and has, either inadvertently or by design omitted to make any corresponding provision in respect of any allocation or apportionment of the expenses of the trade. In other words, when, for the purposes of taxation under Schedule D, Case I, you come to compute the profits, you have to exclude altogether this £78,000 because there is according to the view which this Court here takes, express exclusion of these profits, and that reduces one side of the computation, but when you come to the other task of ascertaining the expenses "wholly and exclusively laid out for the purposes of the trade", you are faced with the total sum, and there is no provision for any apportionment. . . . . . the short result is that I find no means, consistent with the language of the Act, of giving effect to this contention of Crown."

Greene, L.J., said at page 576:

"The argument for the Crown on that point is of this nature, that in the account of a trading company made out for the purposes of its return under Case I of Schedule D the interest with which we are concerned must, in the first instance, be brought into the account as an item of receipt; and that the statutory provisions which exempt interest from tax are to be given effect to by then removing altogether that item from the statement of profits and gains, and removing with it something which clings to it in the process of removal, namely, some apportioned part of the expenses of the company. Now I can find no warrant whatever in the language of the statute to produce that result. When the statute says that interest is to be exempt I am quite unable to read it as meaning that in giving effect to that exemption by implication some repercussion is to take place on a different provision of the Act altogether. It seems to me quite improper to read any such implication into it. Counsel for the appellant says, and says with truth, that there are many cases in the working of the Act where it is necessary to make apportionments, and the instances as one the case where a non-resident company carries on business both in England and abroad and its accounts have to be dissected in order to bring in only that part of the business which is appropriate for the purpose of taxation. That is perfectly true, and the reason why the dissection has to be made there is that the statute quite clearly requires it and cannot be effective unless it is made. But in this case I can find nothing in the statute which requires this interest to be treated, so to speak, as a trade within a trade. This is really what the Crown contends, that in some way this interest which is to be brought into the account as an item of receipt is to be taken out of it with some apportioned expenses appropriated to it as though it were a trade by itself. If the Legislature had intended that, in my opinion, it should have said so, and I am quite unable to construe the language of the relevant exemption clauses—because the suggested result can only arise from an implication from those clauses or a qualification upon them—in the way contended for."

Romer, L.J., put it thus:

"Two alternative views may be taken on that question, views which I think I can best explain by an illustration. Suppose that a company—a non-resident company trading here—has in a parti-

1. (1938) 6 I.T.R. 541. 2. (1938) 6 I.T.R. 636.

cular year trading receipts amounting to £3,000, consisting of £1,000 from War Loan and £2,000 from other sources, and supposing that its trading expenses, properly chargeable under Schedule B, Case I, amount in the year to £600, the balance of profits and gains is £2,400. On that sum the Crown would be entitled to levy tax, but it will be observed that of that £2,400,£1,600 may be said to come from sources of revenue other than the interest of War Loan and £800 from interest of War Loan, and when the Crown seeks to lay its hand on the £800 for the purpose of taxing it, the tax-payer may say: "No. Section 46 forbids that; therefore you can only tax me on £1,600." In other words, the result of section 46 would be to remove from the company's profit and loss account not the whole £1,000 interest on War Loan, but the £1,000 less its proper proportion of the trading expenses of the company. That is one way of looking at it. The other way of looking at it involves the application of section 46 at an earlier stage. The application takes place in this way and at this time. When the company is drawing up its profit and loss account, or somebody is drawing it up on its behalf, the moment that amongst the trading receipts is put down this £1,000 the company says: "No, that must be removed from the account altogether having regard to section 46 because by reason of section 46 we are, for income-tax purposes, to be treated as being in exactly the same position as though the War Loan, which we have, produced no income at all." The result of that would be of course, in the illustration I have given, that a company would be taxed under Case I merely on £1,400.

Now, I confess that the first of those two alternative views possesses for me a certain attraction. On the other hand, the Master of the Rolls—and Greene, L.J., I understand, agrees, with him—has taken the view that the second of those alternatives is to be preferred. I am not so enamoured of the first alternative as to differ from them."

When the House of Lords confirmed this decision on appeal in *Hughes (Inspector of Taxes)* v. *Bank of New Zealand*[1], Lord Thankerton stated at pages 643-4 :

" . . . . . it seems to me to be incontrovertible, that in the present case, the investments in question were part of the business of the respondents' trade and that the expense connected with them was wholly or exclusively laid out for the purposes of the trade. Expenditure in course of the trade which is unremunerative is none the less a proper deduction, if wholly and exclusively made for the purposes of the trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense. I agree on this question with the decision of the Courts below."

The principle laid down in *Bank of New Zealand case*[2], was extended and applied by this Court in *Chellappa Chettiar* v. *Commissioner of Income-tax, Madras.*[3] The headnote runs :

" Where a person who is carrying on business as a money-lender borrows money for his money-lending business and lends it out to constituents, and is obliged in the course of his business to receive agricultural lands in repayment of his debts from such constituents, he is entitled to the deduction of the interest paid by him also on so much of the capital borrowed by him for business purposes as is represented by the agricultural lands got in, under section 10 (2) (iii) in computing the profits and gains of his money-lending business. He is also entitled to a deduction in respect of the establishment and other charges incurred by him for managing and cultivating such lands and the amount spent for obtaining conveyances of such lands."

At pages 109-110 the learned Chief Justice* referred to the decision of the Cout of Appeal in the *Bank of New Zealand case*[2], and at page 110, after pointing out that the agricultural activities of the assessee were inextricably mixed with and incidental to the money-lending business, the learned Chief Justice* observed :

" The above decision seems to support the view which we have expressed that in the absence of any express provision in the Act, the assessee is not to be deprived of the advantages conferred by exemptions such as section 10 (2) (iii) because the capital benefiting there from by means of permissible deductions happens to produce a non-taxable income."

Thus the fact that the securities in the case of the Bank of New Zealand and agricultural lands of Chellappa Chettiar were acquired out of, investments of borrowed monies, and that the subsequent income from these sources was not taxable made no difference to the question, whether the trading expenses including interest charges were deductible as expenses of the business the assessee carried on. The statutory provision in this country which authorises deduction of such interest charges is section 10 (2) (iii). Applying the principle laid down in these cases to the facts of this case we reach the position, that, even if the Bank had acquired the Mysore Securities from out of the funds on which interest charges were paid in the year of account, the fact that the income from the Mysore Securities was not taxable did not make the interest charges anytheless trading expenses of the Bank, expenses for the deduction of which, in computing its business income section 10 (2) (iii) provides. No apportionment is permissible where the deduction is under section 10 (2) (iii).

1. (1938) 6 I.T.R. 636.
2. (1938) 6 I.T.R. 541.
3. (1937) 1 M.L.J. 351 : I.L.R. (1937) Mad. 734 : 5 I.T.R. 97 (S.B.).

* It must be Mockett, J.—Ed.

In *United Commercial Bank, Ltd.* v. *Commissioner of Income-tax*[1], the Bank's income from the securities it held was computed under section 8 of the Act, and the net assessable income under that head amounted to Rs. 23,62,815. The Bank also derived income from tax free securities. A loss of Rs. 8,86,972 was ascertained when its business income was computed under section 10. One of the contentions of the Bank based on this *Proviso* to section 8 was :

" It was lastly contended by the assessee that it should be allowed a deduction from its interest income of not only the interest payable on borrowings which it had invested in taxable securities, but also of the interest payable on the borrowings invested in securities which were tax-free."

That contention was negatived. The claim there was by the assessee for an apportionment of its expenses between its genral business activities and its dealings with reference to securities inclusive of the tax-free securities. That claim was rejected, and all the expenses were obviously taken into account only for the computation of the business income under section 10. In the case before us the claim for apportionment is made by the Department, and we can see no basis in the Act for sustaining that claim.

In *Indian Steamship Co., Ltd.* v. *Commissioner of Income-tax*[2], the headnote itself is sufficiently explanatory of the facts. The assessee, a steamship company, existed in a moribund condition till the year 1943-44 and its subscribed capital amounted to only about Rs. 3,000. In 1944-45 the assessee decided to launch upon real business and obtained the permission of the Controller of Capital Issues for the issue of shares and debentures. The Controller however imposed a condition that any sum in excess of a certain amount received by the assessee should be invested in Government securities, pending actual expenditure on the purchase of ships. The assessee accordingly invested a certain sum in Government securities and received interest assessable under section 8. The assessee claimed that since the money raised had to be invested in Government securities by reason of the condition imposed by the Controller the debenture interest paid should be deducted under section 8. The Income-tax authorities disallowed the claim on the ground that the object of issuing the debentures was not to invest the money in securities, but to employ it in the assessee's business and that the condition imposed by the Controller made no difference. The Court accepted the view of the Department and held that the assesee was not entitled to the deduction claimed. The position of the Bank if anything is better. It cannot be said that it borrowed monies that is, it received its deposits, to purchase securities in general or tax-free Mysore Securities, independent of the fact to which we have already adverted, that there was no connection between the deposits on which interest was paid in 1950 and the purchase of these securities.

The learned counsel for the Department referred to *Somasundaram Chetty* v. *Commissioner of Income-tax*[3], which was followed by the Bombay High Court in *Provident Investment Co., Ltd.* v. *Commissioner of Income-tax*[4], and by the Lahore High Court in *Macnabb* v. *Commisioner of Income-tax, Punjab*[5]. In that case the assessee carried on a money-lending business in British India and in Ipoh in the Federated Malay States. He borrowed money in Madras and sent it out to Ipoh and used it there as capital of the business. The interest paid on amounts borrowed in India and remitted to Ipoh was claimed as a deduction under section 10 (2) (iii) of the Act. That claim was disallowed. At page 509 the learned Chief Justice however observed :

" . . . . . in my view " the business " means the business whose profits are being assessed, moreover, in the year under consideration."

Earlier he had observed :

" The only reasonable construction of the section is to construe " capital borrowed for the purpose of the business " as meaning capital borrowed and used for the purposes of the business."

Even that test is satisfied in this case. That a particular item of its business income is not taxable does not make it any the less income of the business. We have already

1. (1953) 24 I.T.R. 425.
2. (1953) 24 I.T.R. 448.
3. (1928) 54 M.L.J. 436 : 2 I.T.C. 505.
4. (1932) I.L.R. 56 Bom. 92 : 6 I.T.C. 21.
5. (1936) 4 I.T.R. 306.

pointed out that the principle laid down by this Court in *Chellappa Chettir* v. *Commissioner of Income-tax*[1], should apply.

The lerarned counsel for the Department referred to *Commissioner of Income-tax* v. *Madras Provincial Co-operative Bank Ltd.*[2], which was followed by the Bombay High Court in *Broach Co-operative Bank Ltd.* v. *Commissioer of Income-tax*[3], where apportionment was permitted. Apart from the fact that these cases dealt with co-operative banks, which stood on a footing of their own, they do not help us to determine the question at issue, whether any portion of the interest charges paid by the assessee-Bank in 1950 came within the scope of the *Proviso* to section 8 of the Act.

We have held that no portion of the interest paid in 1950 was on money borrowed for the purpose of investment in securities within the meaning of the *Proviso* to section 8. If the *Proviso* to section 8 did not apply at all, there can be no question of apportioning under that *Proviso* the interest charges between monies utilised for investment in tax free securities and monies invested in investment of securities, the interest or income from which is chargeable to tax. We have also held that all the deposits on which interest was paid in 1950 constituted borrowed capital within the meaning of section 10 (2) (iii). Where interest charges are to be deducted under section 10 (2) (iii) of the Act, there can be no apportionment on the basis, that a portion of the income resulting from the trading activities of the assessee was tax-free. There was thus no statutory basis for any apportionment. Once again we have to emphasise that, where the deduction has to be under section 10 (2) (iii) and not under the *Proviso* to section 8, the fact that the income from the Mysore Securities was tax-free was not a relevant factor. Rs. 2,80,194 was also an item of admissible deduction under section 10 (2) (iii) of the Act.

Our answer to the question is that the entire interest paid by the Bank in the year of account inclusive of the sum of Rs. 2,80,194 was a permissible deduction under section 10 (2) (iii) of the Act.

The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

K.L.B. ——— *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

Y. Venkatarama Iyer .. *Petitioner**

v.

Asan Mohamed Rowther and others .. *Respondents.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), *sections* 3 *and* 4—*Cultivating tenant subleasing the lands—Whether outside the Act.*

Under section 3 (2) (*b*) of the Madras Cultivating Tenants' Protection Act, if a tenant sub-leases the land he is liable to eviction under section 4 (*a*) and (*b*) of the Act for that very reason. The mere fact that the tenant has ceased to cultivate the lands by reason of such sub-lease, does not mean that he goes outside the scope of the operation of section 4 (*a*) and (*b*).

Petition under section 6-B of Act XXV of 1955 as amended by Act XIV of 1956 read with section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Assistant Collector of Pollachi, dated 26th August, 1959 and made in C.M.C. No. 9 of 1959.

A. Ramanathan, for Petitioner.

S. Mohan and *T. Sathiadev*, for Respondents.

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1. (1937) 1 M.L.J. 351 : I.L.R. (1937) Mad. 734 : 5 I.T.R. 97.
2. (1943) 1 M.L.J. 46 ; I.L.R. (1943) Mad. 390 : 10 I.T.R. 490.
3. (1949) 17 I.T.R. 489.

* C.R.P. No. 2099 of 1959. 21st April, 1961. (1st day of Visaka, 1883-Saka).

The Court made the following

ORDER.—The petitioner made an application under section 3 (4) (*a*) of the Madras Cultivating Tenants' Protection Act for the eviction of the respondents. The first respondent was the lessee. The grounds for eviction were that the first respondent had defaulted in the payment of rent and had also sub-leased the land to the remaining respondents. The learned Assistant Collector found that the first respondent had in fact sub-leased the land to the other respondents. Having so found he proceeded to hold that since the first respondent had ceased to cultivate the lands he was no longer a cultivating tenant and hence was not amenable to any action under the Cultivating Tenants' Protection Act. In the case of the other respondents they being only sub-lessees he held they were not cultivating tenants to evict whom the petitioner should take proceedings in the civil Court. It is against this order that the landlord has moved this Court in revision.

In so far as the order of the Assistant Collector in relation to the sub-lessees, is concerned that is perfectly correct. No relief as against them is available to the landlord under the above mentioned Act.

But in so far as the relief that was asked for against the first respondent is concerned, it seems to me that the learned Assistant Collector has misread the provisions of the Act. That the first respondent has rendered himself liable to eviction under section 3 (2) (*b*) of the Act is beyond question. But just for the reason that he no longer cultivates the land he cannot escape the jurisdiction of the Court in so far as his status as cultivating tenant is concerned. Quite obviously he was a cultivating tenant when he took lease of the lands and by reason of violating certain of the provisions of the Act, he has brought himself within the scope of those provisions which entail eviction. He does not for the sole reason that he has sub-leased the lands cease to be a cultivating tenant not amenable to the processes of the Act. The sub-leasing of the lands is an act which comes within the scope of section 3 (2) (*b*) of the Act entailing the eviction of the lessee. The section having provided that an act of this kind would entail eviction, under sub-section 4 (*a*) a person becoming so liable shall be directed to be evicted by the Revenue Divisional Officer. Notwithstanding that a person ceased to cultivate the lands by reason of such sub-lease he does not go outside the scope of the operation of sub-sections 4 (*a*) and 4 (*b*). Learned Assistant Collector was wrong in holding that because he did not cultivate the lands he was not amenable to the jurisdiction of the Court.

Learned counsel for the petitioner further claimed that the first resondent had admitted that he was in arrears of rent. That was also one of the grounds upon which the petition for eviction was founded. But the learned Assistant Collector has naturally enough made no directions with regard to the rent. It is obvious that the Act only contains certain enabling provisions with regard to the arrears of rent in the sense that if the tenant is willing to deposit the arrears the Court can accept such deposit and pass orders consequently thereupon dismissing the petition for eviction, if such petition is based on the ground of default in the payment of rent. But the Court cannot pass a decree, as it were, for the recovery of arrears of rent. I am anot able to agree with the learned counsel for the petitioner that the Court has failed to consider the landlord's claim for the arrears. Even if an order for eviction is passed on the ground of arrears of rent, solely on the basis of the order made by the Revenue Court the landlord cannot realise the arrears.

In the result the order of the Assistant Collector is set aside. There will instead be an order of eviction of the first respondent under section 3 (4) (*b*) of the Act. No order as to costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE KAILASAM

C. Lakshmiah Reddiar .. *Appellant**

v.

The Sriperumbudur Taluk Co-operative Marketing Society Ltd., No. G. 1253 represented by its President at Nazarathpet, Poonamallee, Chingleput District .. *Respondent.*

Constitution of India (1950), *Article* 226—*Writ under—Against whom could lie—Board of Directors of a Co-operative Society considering objections to nomination for election—If Tribunal with authority to determine rights of parties.*

Madras Co-operative Societies Act (*VI of* 1932), *section* 51—*Scope of.*

It is only against bodies having legal authority to determine questions affecting the rights of subjects that the jurisdiction of the High Court under Article 226 of the Constitution could be invoked. The Board of Directors of a Co-operative Society, in considering the objections to the nominations for the election of members of the Board, is not a Statutory Tribunal with authority to determine the rights of parties. It may be that the Directors at a meeting of the Board discharged the functions entrusted to them by the Regulations. But the Regulations being framed by the Society itself have no statutory force.

A candidate whose nomination has been rejected is not without remedies. Section 51 of the Madras Co-operative Societies Act is wide enough to include a dispute relating to election of directors of a Co-operative Society and a dispute relating to the validity of a nomination will also be covered by it. The candidate can challenge the rejection of his nomination by the Board of Directors before the Registrar of Co-operative Societies. *Muthuvelappa Gounder* v. *Deputy Registrar of Co-operative Societies*, (1960) 2 M.L.J. 392, approved.

As the Board of Directors of a Co-operative Society are not occupying a judicial or quasi-judicial office there could be no application of the principle of bias to their actions.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Ramakrishnan, dated 30th March, 1961 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 379 of 1961 presented under Article 226 of the Constitution of India to issue a writ of *certitorari* calling for the records relating to the Orders of the Sriperumbudur Taluk Co-operative Marketing Society Ltd., G. 1253 and quash the order, dated 19th March, 1961 and made therein.

S. Mohan Kumaramangalam for *T. V. Balakrishnan* and *N. Vanchinathan*, for Appellant.

The Advocate-General (*V. K. Thiruvenkatachari*) for *R. Gopalaswami Iyengar*, and *K. N. Balasubramanyam*, for Respondent.

The order of the Court was made by

Rajamannar, C.J.—This is an appeal from the Judgment of Ramakrishnan, J., dismissing a petition (W.P. No. 379 of 1961) filed under Article 226 of the Constitution by the appellant C. Lakshmiah Reddiar for the issue of a writ of *certiorari* or any other appropriate writ to quash the proceedings of the Board of Directors of Sriperumbudur Taluk Co-operative Marketing Society, dated 19th March, 1961, in so far as they relate to the rejection of the nomination paper of the appellant in connection with the election of the Directors of the Society. The appellant's nomination was rejected on the ground that he had not brought to the Society a quantity of 50 maunds of paddy for sale through the Society. The main ground on which the appellant impugned the order of the Board of Directors was that the entire proceedings relating to the scrutiny of nomination papers were vitiated by gross violation of all principles of natural justice inasmuch as the Directors, who had offered themselves for re-election, took part in the disposal of the objection to the nomination of the appellant. The appellant alleged that his nomination was rejected to avoid competition. The Directors had acted as judges in their own cause. The respondent-society opposed the application on two grounds.

*W.A. No. 40 of 1961.

3rd May, 1961.
(13th Vaisakha, 1883, Saka).

(1) That the Directors, who sought the election, did not take part in the rejection of the appellant's nomination and, even if they did, there was no warrant in the bye-laws that such Directors should not be present at the meeting.

(2) That the Society was a private Society and the proceedings relating to the internal administration of such a society will fall outside the special jurisdiction of this Court under Article 226 of the Constitution. The learned Judge, Ramakrishnan, J., who heard and disposed of the application, dismissed it holding that the Directors had conformed to bye-law 6 in substance in the disposal of the objection and that there was no violation of any principle of natural justice. Hence this appeal.

Certain Regulations (which were referred to by Ramakrishanan, J., as bye-laws) were made by the Society for the conduct of the election of Directors from among the members of the Society. Regulations 5 and 6 are material to the disposal of this appeal. They run thus :

5.—" The nomination papers shall be scrutinised and disposed of by the Board of Directors and by two other members nominated for the purpose by the Board of Directors on the second day following the last date fixed for the receipt of nomination papers at the meeting convened for the purpose and the list of candidates eligible for election shall be published on the notice board of the Society after scrutiny on the same day. Provided that such of the Directors as stand for re-election shall not take part in the scrutiny.

6.—Any objection to the nomination shall be made in writing before 5 P.M. on the day following the last date fixed for the filing of the nominations and they shall be disposed of by the Board of Directors at its meeting in the presence of the two other members nominated by the Board for the purpose mentioned in rule 5."

Two members appear to have been nominated for the scrutiny of the nomination papers as contemplated by Regulation 5. These two members admittedly did not reject the appellant's nomination paper on scrutiny. After the scrutiny was over the Board of Directors dealt with the objections to the several nominations including the nomination of the appellant before us. It was not disputed before us that all the Directors present at the meeting, except the *ex-officio* Directors, were themselves candidates for the election and they had participated in the proceedings which included *inter alia* the objection to the nomination of the appellant. *Prima facie*, Regulation 6 does not expressly prohibit such of the Directors as stood for re-election from taking part in the proceedings for consideration of the objections to nominations. The contention of Mr. Kumaramangalam was that though there is no such express prohibition, there was a well recognised canon of natural justice which should be followed, *viz.*, that no man can be a judge in his own cause. Here was a case where obviously there would be a conflict between duty and interest. He also submitted that the spirit underlying the prohibition contained in Regulation 5 would equally apply to the stage of consideration of the specific objections to the nominations. If the Directors, who stood for re-election, should not take part in the scrutiny of the nomination papers under Regulation 5, it does not stand to reason that they can take part in a consideration of an objection to any nomination. He relied on the ruling of this Court in *Dr. Ramakamath* v. *Surgeon General*[1], that in an enquiry held by a quasi-judicial Tribunal no members of the Tribunal should take part, who were interested in the result of the subject-matter of the enquiry before such Tribunal. In that case certain members elected to the Madras Medical Council were present at a meeting of the Council at which objections regarding the election of such members to the Council were considered. The principle underlies the conception of 'bias' as vitiating the decision of a Tribunal entrusted with judicial or quasi-judicial functions.

The learned Advocate-General raised a preliminary objection to the maintainability of the writ petition. The objection was that a writ could not issue under Article 226 of the Constitution to any body, which was not a judicial or quasi-judicial Tribunal statutorily entrusted with the right and duty to decide disputes between parties. This limitation on the power to issue prerogative writs is stated thus in one of the leading authorities on the subject *Rex* v. *Electricity Commissioners*[2], where Atkin, L.J., said at page 205 :

1. (1950) 2 M.L.J. 322 : I.L.R. (1951) Mad. 419.
2. L.R. (1924) 1 K.B. 171.

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

In *R.* v. *Disputes Committee of Dental Technicians*[1], Lord Goddard, C.J., described thus the class of bodies to which the prerogative writs issue :

"The bodies to which in modern times the remedies of these prerogative writs have been applied are all statutory bodies on whom Parliament has conferred statutory powers and duties the exercise of which may lead to the detriment of subjects."

In *R.* v. *Statutory Visitors, Caterham*[2], the same learned Chief Justice, after referring to the passage from *Rex* v. *Electricity Commissioner*[3], above cited, applied the same test (*vide* also Halsbury, 3rd Edn., Vol. 11., page 134.)

Mr. Kumaramangalam was unable to overcome this objection. In the case before us the proceedings sought to be quashed were the proceedings of a meeting of the Board of Directors of a Co-operative Society. The Board in considering the objections to the nominations for the election of members of the Board of Directors is not a statutory Tribunal with authority to determine the rights of parties. No doubt, the Directors at a meeting of the Board discharged the functions entrusted to them by the Regulations, but these Regulations are framed by the Society itself and have no statutory force. Clearly, therefore an order of this Court under Article 226 of the Constitution cannot issue to quash the proceedings of such a body.

On this ground the Writ Appeal must be dismissed and the dismissal of the appellant's Writ Petition confirmed.

The appellant is not without remedy. He can seek redress under section 51 of the Madras Co-operative Societies Act of 1922 which provides for the decision of any dispute touching the business of a registered society by the Registrar of Co-operative Societies. A Full Bench of this Court in *Madhava Rao* v. *Surya Rao*[4], held that a dispute relating to the election of Directors of a Co-operative Bank registered under the provisions of the Co-operative Societies Act is one touching the business of the Bank within the meaning of section 51 of the Act. A recent decision of Jagadisan, J., has extended the scope of section 51 of the Act so as to include a dispute regarding the validity of a nomination of a candidate for election to the Board of Directors of a Registered Society. The *ratio decidendi* of the Full Bench decision in *Muthuvelappa Goundar* v. *Deputy Registrar of Co-operative Societies*[5], was applied to a dispute as to the validity of a nomination. He observed as follows :—

"It is not possible to dissociate the stage of nomination from the stage of return of the Candidate after polling and declaration of the results, in such a manner as to import the notion of business of society only to the latter stage of election, and not to the former stage of nomination. In fact the whole process of election commences from the stage of nomination and the word election has been considered as including nomination also in its wide sense of the term."

We are in entire agreement with this view of the learned Judge. The appellant can therefore challenge the rejection of his nomination by the Board of Directors before the Registrar of Co-operative Societies.

It is obvious that when the appellant pursues such a remedy, the Registrar must himself dispose of the objection to the appellant's nomination to determine whether the rejection by the Board of Directors was proper. If the objection were to prevail on the merits, then the rejection of the appellant's nomination would stand. Otherwise, it would be overruled.

The learned Advocate-General submitted that if the Writ Appeal is disposed of on this ground, *viz.*, that the Board of Directors is not a statutory Tribunal to which the writ of *certiorari* could issue, there can be no question of bias, because the disqualification based on bias applied only to quasi-judicial Tribunals, who are bound to act

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1. (1953) 1 All E.L.R. 327.
2. (1953) 2 All E.L.R. 766.
3. L.R. (1924) 1 K.B. 171 at 205.
4. (1953) 2 M.L.J. 340 : I.L.R. (1953) Mad 1047 (F.B.)
5. (1960) 2 M.L.J. 392 at 397.

judicially. The learned Advocate-General drew our attention to the following observations of Lord Thankerton in *Franklin* v. *Minister of Town and Country Planning*[1]:

> "My Lords, I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute."

The Board of Directors of this Society had not occupied either a judicial, or a quasi-judicial office and, therefore, the principle of bias has no application to their actions. This is true, but, as we have already pointed out, when the objection to the appellant's nomination will have to be considered on the merits by the Registrar on a reference under section 51 of the Act, the question becomes academic whether the action of the Directors was vitiated by bias. All that we can say is that in the circumstances, the order of the Board will not have the effect of a *prima facie* decision against the appellant entitled to weight at the initial stage, subject, of course, to a displacement by another Tribunal. It is clear that the appellant cannot succeed in getting rid of the objection to his nomination merely on the ground that the Directors, who were themselves standing for election, had participated in the disposal of the objection.

We cannot, however, refrain from pointing out the defect in Regulation 6, as it now stands. That Regulation will, by itself, not prevent a candidate for election participating in a meeting to consider the validity of his own nomination. This is certainly not desirable in public interests. Steps must be taken to remedy the defect. There should be a specific provision such as is contained in Regulation 5 prohibiting the Directors, who were seeking re-election from taking part in the disposal of objections to nominations. Mr. Mohan Kumaramangalam referred to Bye-law 18, which lays down that no member of the Board of Directors shall be present at a meeting of the Board, when any matter in which he is personally interested is being discussed. It is not necessary to decide whether this will apply to a meeting of the Board at which objections to nominations are disposed of. If it does apply, then a difficulty may occur, as there may not be the prescribed quorum, if all such Directors are excluded from the meeting. All these matters should be clarified by further bye-laws and regulations. More than that it is not necessary to say for the disposal of this appeal.

The appeal fails and is dismissed, but there will be no order as to costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

N. S. K. L. Kulandayan Chettiar .. *Appellant**

v.

AR.RM. Omayal Achi and another .. *Respondents.*

Principal and Agent—Accounting—Duty of agent to account—When arises—Suit for account—If to be preceded by demand for rendition of accounts.

Limitation Act (IX of 1908), *Article* 89*—Computing of period of Limitation—How made.*

In cases of principal and agent where the agency itself is terminated, the principal can maintain a suit for account against the agent without a prior demand before the institution of the suit. Hence the period of limitation will start from the date of the termination of the agency. Where the agency is still continuing however the period of limitation will commence from the date of demand for account and refusal which is the basis of the cause of action. Rendition of account does not mean a mere physical handing over of the books of account by the agent to the principal.

1. L.R. (1948) A.C. 87 at 103.

* S.A. No. 1144 of 1958.

3rd April, 1961.
(13th Chaitra, 1883—Saka).

Appeal against the Decree of the District Court of Ramanathapuram at Mathurai in Appeal Suit No. 205 of 1957 preferred against the Decree of the Court of the Subordinate Judge of Devakottai in Original Suit No. 157 of 1953.

K. S. Desikan and *K. Raman*, for Appellant.

R. Srinivasavaradan and *R. S. Venkatachari*, for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal arises out of a suit by a principal against his agent for rendition of accounts. The defendant is the appellant, against whom a preliminary decree for rendition of accounts has been passed.

The plaintiff, S.RM.AR.RM. Ramanathan Chettiar in O.S. No. 157 of 1953 on the file of the Subordinate Judge's Court of Devokottai sued the defendant, the appellant herein for rendition of accounts in respect of the agency of the defendant of the plaintiff's money-lending firm at Rangoon run under the vilasam S.RM.AR.RM. with branches at Dedaye, Kungayangon and Paungde. The defendant was employed as an agent on a monthly salary of Rs. 160, as per the salary chit dated 7th September, 1947. He returned to India on 24th November, 1950 and handed over some kurippu chittais, accounts and some correspondence between him and the plaintiff. The suit was filed on 24th November, 1953.

The defendant resisted the suit on various grounds. He contended that the suit was barred by limitation, and he also contended that the suit was not maintainable as the plaintiff had failed to make a demand upon him for rendition of accounts prior to the institution of the suit. He denied that he executed a varthamanam dated 24th November, 1950 voluntarily but pleaded that it came into existence as a result of coercion and pressure exercised upon him by the plaintiff.

During the pendency of the suit the plaintiff died and his legal representatives were brought on record as plaintiffs 2 and 3. The learned Subordinate Judge of Devakottai dismissed the suit on his finding on Issue 5 that there was no demand prior to the suit and that the absence of such a demand was fatal to the maintainability of the suit. He however negatived the defendant's contention that Exhibit B-8 was not executed by him voluntarily, and he also negatived the plea of the defendant that the suit was barred by limitation.

The aggrieved plaintiffs, the legal representatives of the deceased Ramanathan Chettiar, preferred an appeal before the District Court of Ramnad at Mathurai. The learned District Judge while concurring with the findings of the Courts below on the question of limitation and on the question of the validity of the varthamanam letter executed by the defendant in favour of the late Ramanathan Chettiar disagreed with the finding on the question of the maintainability of the suit and held that the suit was maintainable. In the result the learned District Judge allowed the appeal, set aside the decree and judgment of the lower Court and granted a preliminary decree for rendition of accounts in favour of the plaintiffs. This Second Appeal has been preferred by the defendant.

Exhibit B-8 dated 24th November, 1950 is the varthamanam letter by the defendant in favour of the late Ramanathan Chettiar. Both the Courts below have found that Exhibit B-8 was executed voluntarily by the defendant on the very day he arrived at India when according to the custom of Nattukottai Chettiar agents, he visited the principal at his residence at Kanadukathan. There is also the evidence to show that on that very date the defendant executed another letter, Exhibit B-7 in favour of the late Ramanathan Chettiar. P.W. 1, Thirumalai Ayyangar, the scribe of Exhibit B-8, has been examined and his evidence has been accepted by the Courts below. There are no grounds for interfering with the concurrent findings of fact, holding that Exhibit B-8 was executed by the defendant in acknowledgment of his liability to render accounts to the late Ramanathan Chettiar freely and voluntarily without any coercion or pressure exercised upon him by Ramanathan Chettiar. Exhibit B-8 is as follows :

" On 24th November, 1950 Varthamanam letter executed and delivered to S. RM. AR. RM. Ramanathan Chettiar avergal residing at Kanadukathan, Ramanathapuram district by N. S. KL. Kulandaiyan Chettiar, residing at the aforesaid village and district is as follows :—

I was doing business as power agent for your firms at Burma. I prepared balance sheets as per accounts for all the firms handed over the same to the substitute Palaniappa Chettiar and came today to this place considering my convenience. Later on, when you send for me at any time, I shall give all particulars in respect of my aforesaid work to your satisfaction and settle. If you have sustained any loss on account of my faults, leniency and mistakes, I shall make good the same. If I fail to give particulars in person and make good the loss as aforesaid, I agree to pay the loss that may be demanded by you and execute this letter. . . . ."

It is unmistakably clear that the defendant acknowledged his liability to render accounts in terms of the varthamanam letter, Exhibit B-8. The defendant's contention was that the agency was terminated on 16th November, 1950 at Burma itself, and that he handed over charge to his successor, Palaniappa on 22nd November, 1950. Exhibit B-8 amounts to a valid acknowledgement of the defendant's liability to render accounts and that was within three years after the termination of the agency. Even accepting the case of the defendant regarding termination of the agency the suit having been instituted on 24th November, 1953 is clearly within the time prescribed under Article 89 of the Indian Limitation Act.

Mr. K. S. Desikan, the learned counsel for the appellant, contended that the suit was not maintainable as there was no evidence of the principal, Ramanathan Chettiar, having made any demand upon the defendant to render accounts, and in this connection relied upon the observations of the Calcutta High Court in *Bharatchandra Chakrabarty* v. *Kiran Chandra Bai*[1]. The observation of the Calcutta High Court is as follows :—

" On the finding that all the papers have been submitted, the plaintiffs were bound to call upon the defendant to explain the accounts which apparently they never did ; and if the defendant had expressed his willingness to explain the accounts, if called upon to do so, and averred that he had never been so called upon, we would have been bound to dismiss the plaintiff's suit as being one without a cause of action. "

Learned counsel also drew my attention to the unreported decision of this Court in A.S. No. 662 of 1948. This Court observed in that decision that it was not necessary to consider the correctness of the observation of the Calcutta High Court extracted above. It seems to me to be plain that where the agency is terminated and the agent fails to render any account to the principal, the principal can maintain a suit against the agent for rendition of account without being obliged to call upon him to render accounts prior to the institution of the suit. If one might refer to the language of Article 89 of the Indian Limitation Act, this position is made clear. The third column of Article 89 provides for two categories of cases ; the first category is in respect of a continuing agent where if the plaintiff wants the agent to render account there must be a demand and refusal by the agent to furnish the principal with a cause of action to sue. But where the agency itself is terminated no such demand is necessary, as the starting point of the limitation as provided for under Article 89 is the date of the termination of the agency. In the absence of any evidence of demand and refusal limitation runs from the termination of agency. *Nabin Chandra* v. *Chandra Madhab*[2]. It is now settled law that rendition of accounts does not mean physical handing over of the account books by the agent to the principal. The defendant has not rendered accounts to the plaintiff as it is indeed clear by the execution of his own varthamanam letter, Exhibit B-8 in the case. The finding of the learned District Judge holding that the suit is maintainable is correct.

The Second Appeal fails and is dismissed. There will be no order as to costs in this Court. No leave.

R.M. ——— *Appeal dismissed.*

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1. (1925) I.L.R. 52 Cal. 66.
2. (1916) 31 M.L.J. 886 : I.L.R. 44 Cal. 1 at 8 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

The State of Madras represented by the Revenue Divisional Officer and Land Acquisition Officer, Mannargudi .. *Appellant**

v.

A.Y.S. Parisutha Nadar .. *Respondent.*

Land Acquisition Act (I of 1894) and Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Notification vesting land in an erstwhile estate in the Government—If could defeat the claim of the owner for compensation.

On principle when once the Government avails itself of the provisions of the machinery under the Land Acquisition Act for compulsory acquisition, treating the subject-matter of the acquisition as not belonging to itself but to others, the State Government comes under an obligation to pay the compensation as provided under the Act.

It is not open to the Government in the course of the proceedings to put forward its own title to the property sought to be acquired so as to defeat the rights of the persons entitled to the compensation. A Notification made under section 3 of the Madras Estates Abolition Act cannot have the effect of defeating the right of the claimant for compensation under the Land Acquisition Act.

Appeals against the Decree of the Court of the Subordinate Judge of Thanjavur, in O.P. Nos. 40 of 1955 and 20 of 1955 respectively.

The Government Pleader (*A. Alagiriswami*) and *G. Ramanujam*, for Appellant.

T. R. Srinivasan and *T. Ramalingam*, for Respondent.

The Judgment of the Court was delivered by

Jagadisan, J.—These two appeals arise out of proceedings by the State Government under the Land Acquisition Act acquiring several items of properties situated in the village of Mukhasa Nanjikottai, Tanjore District, for the public purpose of construction of quarters for the Armed Reserve. The claimant before the Land Acquisition Officer was one A.Y.S. Parisutha Nadar. At the inception the claim was made for himself and as guardian of his minor children. Being an Indian Christian governed by the Indian Succession Act and the properties acquired being the sole and exclusive properties of Parisutha Nadar at the subsequent stages of the proceedings following the award by the Land Acquisition Officer, he alone figured as the claimant.

O.P. No. 40 of 1955 on the file of the Subordinate Judge's Court of Tanjore arose out of a reference by the Land Acquisition Officer under section 18 of the Land Acquisition Act, 1894 and that related only to the quantum of compensation payable to the claimant. O.P. No. 20 of 1955 on the file of the same Court arose out of a reference under sections 30 and 31 (2) of the Land Acquisition Act and that related to the title of the claimant to receive the compensation amount payable as a result of the acquisition.

The total extent of the plots acquired was 8 acres, 63 cents and 278.8 sq. feet comprised in four items : (i) R.S. 1/2-A : (ii) T.S. 2851-A-1 ; (iii) T.S. 2851-B-1 and (iv) T.S. 2851-C-1-A. Before the Land Acquisition Officer the claimant claimed compensation at the rate of Rs. 5,500 per acre. The Land Acquisition Officer awarded compensation only at the rate of Rs. 2,000 per acre. At that rate the amount of compensation worked out to Rs. 17,272-12-0. To this a sum of Rs. 1,437-8-0 was added representing the value of building, wells, crops, trees, etc. The 15 per cent. solatium came to Rs. 2,806-8-0. The total award of compensation was therefore Rs. 21,516-13-6. At the stage of the reference under section 18 of the Act before the Subordinate Judge of Tanjore the claimant put forward a claim at the rate of Rs. 6,063 per acre. . The learned Subordinate Judge in modification of the award made by the Land Acquisition Officer fixed the amount of compensation at the rate of Rs. 5,445 per acre. On this basis the amount payable

*Appeals Nos. 169 and 230 of 1957 and Memorandum of Objections in Appeal No. 169 of 1957.

2nd November, 1960.
(11th Kartika, 1882—Saka.)

by way of compensation came to Rs. 54,078-11-0. A.S. No. 169 of 1957 has been preferred by the State of Madras against this award of the Sub-Court of Tanjore. The contention on behalf of the State Government is that the award made by the Court below is excessive.

The Mukhasa village of Nanjikottai wherein the acquired properties are situated was notified under Madras Act XXVI of 1948 and was taken over by the State Government under Notification, dated 22nd December, 1952. In O. P. No. 20 of 1955 on the file of the Sub-Court, Tanjore, the State Government raised the contention that the claimant is not entitled to draw the compensation amount as there was no patta in his favour issued under the provisions of the Madras Estates Abolition Act of 1948 and the learned Subordinate Judge overruled this contention holding that the claimant was not in any way disentitled to get the benefit of the award. A.S. No. 230 of 1957 has therefore been preferred by the State Government challenging the correctness of this decision of the learned Subordinate Judge as well.

We shall first deal with A.S. No. 169 of 1957 raising the question of the proper compensation amount payable by the State Government for the acquisition made. The acquired properties are admittedlv situated in a prominent, aristocratic locality in the Tanjore town. On the west of the acquired sites the residential quarters of the District Superintendent of Police. the District Collector, the District Judge, the District Engineer and the other officers are situated. Quite a large number of big bungalows have been built by waealthy residents of the locality in the row opposite to the quarters of the aforesaid officers. The raiway station of Tanjore lies in close proximity to the sites. They abut the Tanjore-Pudukottai Road. The area in which the sites are located is such as to covet persons to purchase plots therein for construction of residential quarters.

The notification under section 4 (1) of the Act was on 28th October, 1953. Under section 23 of the Land Acquisition Act in determining the amount of compensation to be awarded for land acquired under the Act the Court should take into consideration the market value of the land on the date of the publication of the notice under section 4 (1) of the Act. The expression 'market value' is not defined under the Act, but it is now settled law that the market value is the price which a willing vendor might reasonably expect to obtain from a willing purchaser. See *Vyricherla Narayana Gajapathiraju* v. *Revenue Divisional Officer, Vizagapatnam*[1]. One of the several guides adopted by the Court fixing the amount of compensation is to have regard to the price for which lands adjacent to the acquired lands or lying in close vicinity thereof were sold and purchased, before the notification under section 4 (1) of the Act. On behalf of the State Government reliance is placed on Exhibit A-6, dated 28th October, 1953, the very date of section 4 (1) notification which was a sale deed executed by one Arulanandaswami Nadar, brother of the claimant in favour of Sri R.A. Sundaram Bishop of Tanjore. The consideration for this sale-deed was a sum of Rs. 2,000. It was only on the basis of this sale-deed that the Land Acquisition Officer awarded compensation at the rate of Rs. 2,000 per acre. We are of opinion that Exhibit A-6 cannot afford a criterion to fix the proper compensation having regard to the evidence on record which shows that Exhibit A-6 was not a normal transaction by which the property therein was conveyed for the prevailing market value. The vendee under Exhibit A-6 was examined on commission and the deposition taken has been filed as Exhibit B-105 in the case. That shows that the vendor Arulanandaswami was of a charitable disposition and that he gave away a few sites adjacent to the property comprised in Exhibit A-6 to an association called Little Flower Colony at a concessional rate. Further under Exhibit B-106, dated 22nd October, 1953, Arulanandaswami who conveyed the property under Exhibit A-6 to the Bishop made a gift to that very Bishop of an extent of about 6 acres of land. The report of the Tahsildar, Exhibit B-104 shows that the sale in favour of Rev. Sundaram under Exhibit A-6 should not be taken as the basis for fixing the compensation amount. As per that report of the Tahsildar Rev. Sundaram told him that Rs. 2,000 which was paid

1. (1939) 2 M.L.J. 45 : I.L.R. (1939) Mad. 532 : L.R. 66 I.A. 104 : A.I.R. 1939 P.C. 98 (P.C).

by him per acre was far below the market price of the sites in the vicinity and that the vendor showed him some concession in the price as the land was purchased for his Diocese. We are of opinion that the sale deeds, Exhibits B-22 and B-24 comprising lands adjacent to the lands acquired can be taken into consideration for fixing the market value of the acquired properties. Exhibits B-22 and B-24 bear the same date 4th June, 1952. The price dislcosed in those two sale-deeds shows that one acre of land was valued at bout Rs. 6,000. It is true that both Exhibits B-22 and B-24 related to bits of property, 15,810 sq. feet and 18, 578sq. feet respectively. The acquired plot being 8 acres, 63 cents and 278. 8 sq. feet is no doubt larger in extent than those covered by Exhibits B-22 and B-24. It may be that some reduction from the market value indicated in Exhibit B-22 and Exhibit B-24 is called for because of the size of the property acquired. The learned Subordinate Judge has only granted compensation at the rate of Rs. 5,445 per acre and not at Rs. 6,000—the rate at which the properties were sold under Exhibits B-22 and B-24.

There is another sale-deed Exhibits B-25, dated 18th October, 1953, in regard to an adjacent land which shows that the value was fixed at Rs. 11,880 per acre. The learned counsel for the State Government contended that Exhibit B-25 ought not to be taken into consideration as the property therein was purchased for the purpose of erecting a petrol bunk. Assuming that Exhibit B-25 fixed the value at a level abnormally higher than the prevailing market value, it cannot be said that the rate Rs. 5,445 per acre fixed by the learned Subordinate Judge is in any way extravagant or excessive.

P.W. 1 the Land Acquisition Officer who passed the award admitted in cross-examination that the land value in the locality has been steadily increasing between 1952 to 1954. On the date of the section 4 (1) notification the market value of the sites in that locality was certainly in an upward trend. As the Judicial Committee pointed out in *Secretary of State for Foreign Affairs* v. *Charlesworth Pilling & Co.*[1], in all valuations judicial or otherwise there must be room for inferences and inclinations of opinion which being more or less conjectural are difficult to reduce to exact reasoning or to explain to others. In *Nowroji Rustomji Wadia* v. *The Government of Bombay*[2], Lord Sumner observed that fixing of fair compensation for land is not an algebraic problem which can be solved by an abstract formula. The learned Subordinate Judge has done his best in fixing the amount of compensation as fairly and accurately as possible having regard to the evidence on record and if we were to modify it in any manner reducing the amount of compensation we will only be introducing our guess in the matter. We do not therefore feel called upon to interfere with the amount of compensation as fixed by the Court below. This appeal therefore fails and is dismissed without costs.

The respondent in A.S. No. 169 of 1957, the claimant, has preferred a memorandum of cross-objections claiming compensation at the rate of Rs. 6,063, per acre. He is not entitled to claim anything more than what he claimed before the Land Acquisition Officer. It is sufficient to say that his claim for enhanced compenstion claiming more than what was awarded to him by the Court below is absolutely devoid of merits. The memorandum of cross-objections therefore fails and is dismissed with costs.

A. S. No. 230 *of* 1957.—This appeal raises the question whether the claimant is disentitled to receive the compensation amount either on the ground that he has no title to the properties acquired or on the ground that there is a statutory bar under the provisions of Madras Act (XXVI of 1948) disabling him to assert any title to those properties. The claimant purchased the properties from his elder brother, Arulanandaswami Nadar under Exhibit B-2, dated 20th September, 1947, for a sum of Rs. 10,000. In respect of item No. 1 (R.S. 1/2-A-6 cents) there is no document of title in favour of Arulanandaswami or in favour of the claimant. Item No. 4 T. S. 2851-B-1 of an extent of 29,419, sq. feet belonged to the Municipal Council of Tanjore as a result of acquisition by the State Government on its behalf as evidenced by Exhibits B-14 and B-15. The Municipal Council conveyed the property

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1. (1901) L.R. 28 I.A. 121 : I.L.R. 26 Bom. 1 (P.C.).
2. (1925) 49 M.L.J. 233 : I.L.R. 49 Bom. 700 : L.R. 52 I.A. 367 (P.C.).

in favour of Arulanandaswami under Exhibit B-7, dated 15th February, 1932. The title of the claimant in respect of this item is therefore indisputable. Items 2 and 3 T.S. 2851-A-1 of an extent of 26,460 sq. feet, T. S. 2851-C-1-A of an extent of 7 acres and 12,786 sq. feet were acquired by Arulandaswami under various sale-deeds, Exhibits B-1, B-2, B-3, B-5 and B-8. It is not necessary to refer to those documents in detail. The properties originally belonged to the members of the Tanjore Royal family who were parties to a partition suit, O.S. No. 3 of 1919 on the file of the Subordinate Judge's Court, Tanjore. Arulanandaswami acquired the properties from the several sharers of the Royal Family and ultimately sold them to his brother, the claimant, under Exhibit B-12, dated 20th September, 1947, as stated already. The recitals in the sale-deeds in favour of Arulandaswami show that he became the owner of both the warams in the lands. The title of the claimant in respect of items 2 and 3 also cannot be disputed. The learned counsel for the State Government contended that the absence of any sale-deed in respect of item 1, R. S. 1/2-A, in favour of the claimant or his brother, Arulanandaswami, would disentitle the claimant to draw the compensation amount payable for that item. It does not appear that this contention was raised on behalf of the State Government in the Court below. The properties acquired and forming the subject-matter of these proceedings were only part of the properties which the claimant had purchased from his brother, Arulanandaswami. The recitals in Exhibit B-12, the sale-deed in favour of the claimant show that this item of property might well have been included under that document. Admittedly the claimant was in possession of this property on the date of the section 4 (1) notification claiming title to the property, and it must be remembered that there is no rival claimant on the scene. We are therefore of opinion that the claimant had made good his claim in respect of the compensation payable to him in regard to all the items of lands comprised in O.P. Nos. 20 and 40 of 1955, Sub-Court, Tanjore.

The main contention urged by the learned counsel appearing for the State Government was that it was not open to the claimant to assert any title to the acquired lands as against the State Government, which became vested with the lands by force of operation of the statute, Madras Act (XXVI of 1948). It was contended that once an estate was taken over by the State Government in exercise of its powers under the Estates Abolition Act the entire land in the taken over estate vested in the State Government in absolute ownership, and that no other claim of ownership in respect of any parcel of the land in the estate can be put forward by any other person as against the State Government without obtaining a ryotwari patta under the machinery of the Act. According to the State Government portions of the lands comprised in the acquisition were described in the revenue records as 'Government open waste'.

Before examining the above contention urged on behalf of the State Government we desire to point out that the State Government is not competent to put forward its own alleged title to the acquired properties in proceedings under the Land Acquisition Act. The scheme of the Land Acquisition Act emerging from its relevant provisions rests on the basis that the lands acquired belong to others and not to the State Government itself. By acquisition of land under the Act the State Government comes under an obligation to pay the market value of the acquired lands as compensation to persons deprived of the properties. The notion of the State Government acquiring its own lands and paying compensation to itself is extremely ridiculous. Section 30 of the Act enables the Collector to refer to the Court any dispute which may arise as to the apportionment of the compensation amount or as to the person to whom the amount or part thereof is payable. Section 31, clause (2) provides that if there be any dispute as to the title to receive the compensation or to the apportionment of it the Collector shall deposit the amount of compensation in the Court to which a reference under section 18 would be submitted. In the scheme of the Land Acquisition Act the dispute referred to under sections 30 and 31 of the Act cannot be a dispute between the State Government on the one hand and the claimant on the other in regard to the title of the property acquired but only a dispute between two or more rival claimants claiming the compensation amount. There is no machinery under the Land Acquisition Act for the

settlement of any dispute between the State Government, the acquiring authority, and the claimant who puts forward title to the property acquired. The State Government having availed itself of the provisions of the Land Acquisition Act for compulsory acquisition of lands for a public purpose treating the subject-matter of acquisition as not belonging to itself but to others is estopped in the course of such proceedings from putting forward its own title to the properties so as to defeat the rights of persons dispossessed from the lands as a result of the application of the Act.

We shall now examine the provisions of the Madras Estates Abolition Act to ascertain its scope and ambit and its true intent and purpose. The Preamble to the Act indicates that the Act was intended to provide for the repeal of the Permanent Settlement and for the acquisition of the rights of the landholders in permanently settled estates and other estates in the State of Madras and for the introduction of Ryotwari Settlement in such estates. The whole object of the Act is to convert zamindari and pre-1936 inam areas into ordinary Government ryotwari villages. Section 3 of the Act is as follows :

"With effect on and from the notified date and save as otherwise expressly provided in this Act—

(*a*) . . . .

(*b*) the entire estate (including all communal lands ; porambokes ; other non-ryoti lands ; waste lands ; pasture lands ; lanka lands ; forests; mines and minerals ; quarries ; rivers and streams ; tanks and irrigation works ; fisheries and ferries); shall stand transferred to the Government and vest in them, free of all encumbrances and the Madras Revenue Recovery Act, 1864, the Madras Irrigation Cess Act, 1865, and all other enactments applicable to ryotwari areas shall apply to the estate ;

(*c*) all rights and interests created in or over the estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine ;

(*d*) the Government may, after removing any obstruction that may be offered, forthwith take possession of the estate, and all accounts, registers, pattas, muchilikas, maps, plans and other documents relating to the estate which the Government may require for the administration thereof :

Provided that the Government shall not dispossess any person of any land in the estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta—

(i) if such person is a ryot, pending the decision of the Settlement Officer as to whether he is actually entitled to such patta ;

(ii) if such person is a landholder, pending the decision of the Settlement Officer and the Tribunal on appeal, if any, to it, as to whether he is actually entitled to such patta ".

Section 11 of the Act enables every ryot in the abolished estate to obtain a ryotwari patta in respect of his ryoti holding. Section 12 of the Act enables the landholder in a zamin estate to obtain ryotwari patta in respect of his private lands. Section 13 of the Act relates to the land holder in an inam estate who can obtain a ryotwari patta in respect of his private lands. Section 15 of the Act enables the Settlement Officer to examine the nature and history of all lands in respect of which the landholder claims ryotwari patta under sections 12, 13 or 14 as the case may be and to decide in respect of which lands the claim should be allowed. Then there are several provisions in the Act regarding the fixing of the compensation amount payable, and the mode of payment and distribution of the compensation amount to several claimants. In this process of statutory conversion of erstwhile zamin and inam estates into ryotwari villages it was the landholder who lost his existence as such. Even this landholder, despite the Act, is not deprived of the holding of his private lands as he had a right to obtain a ryotwari patta in respect of such lands. The vesting of the entire estate as provided for under section 3 of the Act free of all encumbrances and the transfer to the Government have got to be understood and interpreted in the light of the object of the enactment and should not be construed as having brought about a total abolition of all rights of ownership of properties lying within the limits of the taken over estate.

The question for determination in this appeal is whether in consequence of the notification of the State Government of the Mukhasa village of Nanjikottai the rights of ownership in the several parcels of lands inhering in several individuals have become extinct. The contention urged on behalf of the State Government is that the statutory vesting of the estate under section 3 of the Act is so full and

complete and unreserved that the State became the sole and exclusive owner of the entire estate, and that it followed that along side that ownership no ownership in favour of any other person can be recognised. In support of this contention the decision of Ramachandra Iyer, J., in *State of Madras* v. *Karuppiah Ambalam*[1], was cited.

In that case the village of Sudaikanendal came under Madras Act XXVI of 1948. Prior to the notification under the Act the village was unsurveyed and a survey was therefore undertaken by the State under section 21 of the Act to facilitate the introduction of Ryotwari Settlement. There was a dispute between the State Government and one of the ryots as to the demarcation of the limits of a tank poramboke. The ryot having failed to establish his rights before the Survey authorities filed the suit, out of which the appeal arose, under section 14 of the Surveys and Boundaries Act. The question for decision in the Second Appeal was whether an erstwhile ryot or landholder who had not yet obtained patta had a right of suit under section 14 of the Madras Surveys and Boundaries Act. The learned Judge held that such a suit was not maintainable. At page 186 Ramachandra Iyer, J., observed as follows :

> " Therefore after the estate vested in the Government, the only right of the landholder, undertenure holder or the ryot was to obtain patta."

Referring to section 3 (*d*) of the Act and the Proviso thereunder it was further observed as follows :

> " This provision does not in any way derogate the absolute vesting of the title in the Government or create any title in the person in possession of the property. . . . . It is therefore clear that in respect of lands in a village taken over by the Government under the Abolition Act there is no ownership by any private individual till that person obtains ryotwari patta from the Government."

These observations of the learned Judge were made in considering the question whether on the facts and circumstances of that case the suit could be properly laid under section 14 of the Madras Surveys and Boundaries Act challenging the demarcation of boundaries by the Survey authorities. The dispute, between the State and the ryot in that case was whether a parcel of land formed part of a tank poramboke or whether it was comprised in the patta land of the ryot. When the ryot insisted that disputed parcel of land was in his patta land and challenged the correctness of the decision of the survey authority in having included it in the tank poramboke, he was in effect and in substance claiming a ryotwari patta in respect of that land. It must be noted that the survey operation in that case was one undertaken under the very provisions of the Abolition Act in order to facilitate the introduction of Ryotwari Settlement. We understand the observation of the learned Judge referred to above as implying nothing more than that it will not be open to a ryot of a parcel of land in an abolished estate to agitate a claim for patta in a civil Court.

The terms of the *Proviso* to section 3 (*d*) of the Act are clear and mandatory. Any person in possession of any land in the estate claiming to be a ryot or a landholder shall not be dispossessed if it were to be found that such a person is *prima facie* entitled to a ryotwari patta under the Act. Sections 11 to 14 are equally mandatory enabling the ryot or the landholder to claim ryotwari patta in accordance with the terms of the said sections. The immunity from dispossession as vouchsafed under the *Proviso* to section 3 (*d*) in favour of persons in possession of parcels of lands in the estate is part and parcel of the vesting of the entire estate in favour of the State Government, and it can be said that to the extent to which this right of immunity has to be recognised the operation of the vesting itself has to be limited. The Act does not create new rights of ownership and the grant of ryotwari patta under the Act is not a conferment of rights by way of grant or conveyance. The obtaining of ryotwari patta by the persons entitled to such patta under the Act can if at all be only in recognition of pre-existing rights of ownership. A ryotwari patta granted by the Revenue Authorities in respect of lands in a Government village is.

1. (1959) 1 M.L.J. 185.

not a title deed but is only a bill for rent. This position has been held by this Court in a series of decisions commencing from *Secretary of State for India* v. *Kasturi Reddi*[1].

We shall now refer to an unreported decision of Ramachandra Iyer, J., in (C.M.A. No. 295 of 1959) *Krishnaswami Thevar* v. *Perumal Konar*[2]. The question that arose for consideration in that case was whether a grant of a ryotwari patta in favour of an erstwhile ryot in an abolished estate amounted to conclusive evidence of title of the property comprised in the patta in favour of the grantee. The learned Judge held that having regard to the scheme of the Abolition Act and the well-known incidents and features relating to ryotwari patta such patta was not conclusive evidence of title of the properties comprised in the patta. The learned Judge dealing with the scope of the Abolition Act observed thus :

"The kudiwaram right and the right to private lands are all incidents of a tenure which had been expressly abolished by the Act. In the place of the old system the ryotwari system has come into being. It will therefore be incorrect to say that the kudiwaram still vested in the ryot and the effect of the grant of patta is only to add to or augment the rights already held. What the Act intended to do was to effect a conversion of the erstwhile Zamindari and Inam estates into ryotwari system of tenure. . . .. it would therefore follow that the statute having declared that the erstwhile ryot (that is the ryot lawfully entitled to be in possession of the holding) would be entitled to patta and not having designated a Tribunal or machinery to decide as to who amongst the several claimants would be entitled to patta, the dispute if and when it arises will have necessarily to be decided by the civil Court."

The learned Judge also referred to his prior judgment in *The State of Madras* v. *Karuppiah Ambalam*[3] and observed thus :

"It is unnecessary to refer to the decision *State of Madras* v. *Karuppiah Ambalam*[3], which concerned the right of a ryot to contest a survey conducted under the Abolition Act. That decision was also rendered with reference to section 56."

There was a provision under the Estates Abolition Act, section 56 which was as follows :

"(1) Where after an estate is notified, a dispute arises as to (*a*) whether any rent due from a ryot for any fasli year is in arrear or (*b*) what amount of rent is in arrear or (*c*) who the lawful ryot in respect of any holding is, the dispute shall be decided by the Settlement Officer.

(2) Any person deeming himself aggrieved by any decision of the Settlement Officer under sub-section (1) may, within two months from the date of the decision or such further time as the Tribunal may in its discretion allow, appeal to the Tribunal ; and its decision shall be final and not be liable to be questioned in any Court of Law."

This provision was repealed by Madras Act XXXIV of 1958. The observation of Ramachandra Iyer, J., in the unreported decision referred to above relating to his prior decision, *State of Madras* v. *Karuppiah Ambalam*[3], indicates that the legal position relating to the maintainability of suits in civil Courts in respect of ryoti lands has undergone a material and radical change after the repeal of section 56 of the Act. In *Adaikalathammal* v. *Chinnayyan Panipundar*[4], a Division Bench of this Court considered the question of the jurisdiction of the civil Court in relation to the dispute between two rival ryots each claiming to be the owner of the land in dispute between them. The learned Chief Justice delivering the judgment of the Bench after referring to the several decisions on the subject observed thus at page 317 :

"We are in entire agreement with this decision of Ramachandra Iyer, J. (*Soosai Udayar* v. *Andiappan Ambalam*[5], We agree that if the relief claimed in a civil Court is not what is created or granted by the Act, *e.g.*, the right to obtain patta but a civil right the jurisdiction of the civil Court which always existed cannot be held to be ousted as the statute does not either expressly or impliedly extinguish such rights."

The learned Chief Justice then referred to the repeal of section 56 of Madras Act XXVI of 1948 by Madras Act XXXIV of 1958 and observed thus :

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1. (1902) 12 M.L.J. 453 : I.L.R. 26 Mad. 268.
2. Since reported in (1961) 1 M.L.J. 168.
3. (1959) 1 M.L.J. 185.
4. (1959) 1 M.L.J. 314.
5. (1959) 1 M.L.J. 195.

" Henceforward the question has really become academic because with the disappearance of section 56 there can be no basis for the plea that the jurisdiction of the civil Court has been ousted."

We are of opinion that the absence of any ryotwari patta in favour of the claimant in this land acquisition proceeding cannot preclude him from contending that he is entitled to be paid the compensation amount by reason of his ownership and possession of the lands acquired. The Abolition Act has not brought about a forfeiture of the rights of his property situated in the estate. This is clear because under the *Proviso* to section 3 (*d*) he is not liable to be dispossessed being, *prima facie* a person lawfully entitled to be in possession of the property. It is not as if that the right of ownership of the property cannot be proved except by the production of a ryotwari patta. As observed by Ramachandra Iyer, J., in the unreported decision referred to above even if such ryotwari patta were to be produced it cannot be conclusive evidence of title. The decisions of this Court have held that the civil Court has jurisdiction to entertain and adjudicate upon a dispute between two rival ryots as to who is the owner of the holding. The repeal of section 56 of the Act has made the position very clear and no doubt can be entertained in respect of the jurisdiction of the civil Court to decide disputed questions of title relating to ryoti lands in an estate taken over under Madras Act XXVI of 1948. The civil Court clothed with jurisdiction under the Land Acquisition Act to decide reference made to it under sections 18, 30 and 31 of the Act is certainly competent to decide the question of title in case of disputes that may be raised in the course of such proceedings. We therefore hold that the contention on behalf of the State Government that the claimant is not entitled to have the compensation amount paid out to him is unsustainable.

Under the Abolition Act, the claimant could claim the benefit of the *Proviso* to section 3 (*d*) if he were sought to be dispossessed from his holding. The claimant has now been actually dispossessed by reason of the machinery of the Land Acquisition Act having been set in motion. He could not obviously resist dispossession under the Land Acquisition Act. The compensation amount now deposited in Court really represents the property from which the claimant has been dispossessed. Such right as the claimant has under the Abolition Act to resist dispossession is fastened on the substituted property. The disability on the part of the State Government to evict the claimant from his holding by virtue of the *Proviso* to section 3 (*d*) cannot be got rid of by merely taking shelter under the Land Acquisition Act, and denying the claimant's right to get compensation. The claimant can well be heard to say that such rights as he had under the Abolition Act in respect of the property from which he has been dispossessed should attach to the fund in Court. If such a right were to be recognised in favour of the claimant it follows that the State Government cannot put forward any obstacle in his way to receive the compensation amount.

The appeal, therefore, fails and is dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Shree Bajrang Jute Mills, Ltd., Guntur .. *Appellants**

Railways Act (IX of 1890), *sections* 39 *and* 41—*Scope of—Railway Rates Tribunal Rules—Discretion and powers of Railway Rates Tribunal—Tribunal opining that it would be fair to grant concessional rates but granting relief only from date of order and not from date of complaint—Interference by writ of* certiorari—*Omission of Tribunal to decide issue as it was unnecessary—If amounts to error rendering decision liable to be quashed—Constitution of India* (1950), *Article* 226.

Though the Railway Rates Tribunal may have jurisdiction to grant relief by allowing concessional rates for haulage over 500 miles, from the date of the complaint there is nothing in the Railways Act and the Railway Rates Tribunal Rules which compels the Tribunal to grant relief from that date. It is certainly within the discretion of the Tribunal to grant relief from a date subsequent to the date

* W.A. No. 158 of 1956. 4th February, 1957.

of the complaint. Where the Tribunal, while holding that it would be fair and reasonable that there should be a concessional rate, did not give effect to it from the date of the complaint, because it found that there were no circumstances which would justify the grant of that concession from the date of the complaint and held that it would be sufficient to give relief from the date of its order, it cannot be said that the discretion has not been exercised judicially or has been improperly exercised so as to justify interference under Article 226 of the Constitution.

Southern Railway v. *The Railway Rates Tribunal*, (1956) 1 M.L.J. 395, referred to.

Where the Tribunal does not decide an issue as to the reasonableness and justification for an increase in rates for the carriage of goods, but it was unnecessary to decide the question for disposing of the complaint before it, because even if it decided the issue in favour of the applicant, the Tribunal would have no jurisdiction to order a refund or give any other substantial relief, the Tribunal cannot be held to have erred or gone wrong in omitting to give a finding on the issue in question, so as to render its decision liable to be quashed by a writ of *certiorari*.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Rajagopalan, dated 7th August, 1956 and made in W.P. No. 358 of 1955 presented to the High Court under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in Complaint No. 1 of 1953 on the file of the Railway Rates Tribunal, Madras, and quash the order therein dated 10th September, 1954.

E. Venkatesam, for Appellant.

The Judgment of the Court was delivered by

Rajamannar, C.J.—Three points were pressed upon us by Mr. E. Venkatesam, learned Counsel for the appellant in this case. The appeal is against the Judgment of Rajagopalan, J., confirming the order of the Railway Rates Tribunal on a complaint made by the appellant-company engaged in the manufacture of jute goods. The first point is that though the Tribunal held that it would be fair and reasonable that there should be a concessional rate, namely 12½ per cent. less than the standard rate for haulage over 500 miles, the Tribunal did not give effect to this concession with effect from the date of the complaint. The Tribunal dealt with this question and in the exercise of its discretion held that there were no circumstances which would justify the grant of that concession from the date of the complaint and that it would be sufficient if the concession should be operative from the date of the order of the Tribunal. It is obvious that though the Tribunal may have jurisdiction to grant relief from the date of the complaint, as was held by this Court in *Southern Railway* v. *The Railway Rates Tribunal*[1], there is nothing which compels the Tribunal to grant relief from that date. It is certainly within the discretion of the Tribunal to grant relief from a date subsequent to the date of the complaint. Mr. Venkatesam urged that assuming that the Tribunal had such discretion, it should be exercised judicially and not in an arbitrary manner. But in this case we are convinced that the discretion has been exercised after consideration of relevant matters. It is not for us to say how we would have exercised our discretion. We agree with Rajagopalan, J., that there is nothing *ex facie* in the order of the Tribunal to hold that the discretion of the Tribunal has been improperly exercised.

The second point is based on Article 14 of the Constitution. There was an enhancement in the rate for jute by re-classification. Jute which was originally in class 2 was placed in classes 7 and 8 in the areas served by all railways except the E.B. and A.B. railways. As regards other commodities, there was only one step-up, that is, goods placed in class 2 were placed in class 3. This differentiation, it was contended, amounted to a discrimination which offended the principle of Article 14 of the Constitution. The Tribunal however has given reasons to justify the re-classification. We cannot say that having regard to the peculiar circumstances relating to the transport of raw jute the re-classification was discriminatory in any sense. There was good reason for re-classifying raw jute as coming within classes 7 and 8. The learned Judge Rajagopalan, J., no doubt does not in terms mention Article 14. All that he says is that there was ample material on the evidence before the Tribunal for its conclusion that the change in the classification was not in reasonable. We have examined the charge levelled by the appellant but we are

1. (1956) 1 M.L.J. 395.

convinced that there was no discrimination which should be struck down by applying the principle of Article 14 of the Constitution.

The third and last point was that Issue No. 1 should have been decided by the Tribunal. That issue runs thus:

"Were the increases in the station-to-station rates for the carriage of jute to the applicant mills and their final cancellation justified and reasonable?"

The matter covered by this issue related to a period anterior to the filing of the complaint. Actually on the date of the complaint there were no station-to-station rates. There was an issue whether the appellant was entitled to any and to what special station-to-station rates. But that was decided against the appellant. It was unnecessary for disposing of the complaint to decide the question whether the periodical increases in station-to-station rates when they existed were justified and reasonable. Admittedly the Tribunal could not have ordered a refund or given any other substantial relief to the appellant even if they were to come to the conclusion in its favour. Having regard to this limitation on the power of the Tribunal, we cannot say that the Tribunal was wrong in omitting to give a finding on Issue 1. There is no substance in this point either.

The appeal is dismissed.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE KUNHAMED KUTTI.

K. Viswanathan .. *Appellant**

v.

The State of Madras, represented by the Commissioner of Commercial Taxes, Board of Revenue, Madras .. *Respondent.*

Madras Entertainments Tax Act (X of 1939), section 7 (1)—Excess collection of tax from the purchasers of the cinema tickets—Management of the cinema house—If could claim the excess.

The management of a cinema house is made, so to stay, the agent of the State for collecting the entertainments tax under the Madras Entertainments Tax Act and when once the tax is collected and paid to the Government the agency ceases. The agent could have no interest in the collections. If there is any excess payment the agent has no interest in it so long as what is paid is what is collected by way of tax. The amount collected as tax is not the income of the person collecting it and he cannot claim refund from the Government on the ground that what has been collected and paid as tax is in excess of what is properly due to the Government.

Appeal against the Decree of the City Civil Court, Madras, dated 6th November 1957 and passed in O.S. No. 1722 of 1956.

T. R. Srinivasa Ayyangar, for Appellant.

The Government Pleader (*A. Alagiriswami*) and *G. Ramanujam,* for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal arises from the decree of the II Assistant City Civil Judge, Madras, in O.S. No. 1722 of 1956 dismissing the suit instituted by the appellant for recovery of a sum of Rs. 17,252-7-0 under the following circumstances.

The appellant is the proprietor of a picture house in Madras known as "Chitra Talkies". Under the provisions of the Madras Entertainments Tax Act the appellant paid certain sums by way of entertainment tax in respect of the five annas tickets sold by him between the period 15th August, 1949 to 18th October, 1953. The amount paid was at the rate of one anna per five annas ticket. The appellant later on discovered as a result of a communication received from the Assistant Commercial Tax Officer that the tax due on a ticket of the gross value of five annas was only nine

* Appeal No. 206 of 1958. 3rd March, 1961. (12th Phalguna, 1882, Saka).

pies, and not one anna, and alleging that he had paid a sum of Rs. 17,252-7-0 by way of excess tax under a mistake of law, filed the suit for recovery of that sum from the Government.

The suit was contested substantially on three grounds, (1) that the payment made to the Government was not the money of the appellant but what was collected by the appellant on its behalf, (2) that the appellant would not be entitled to obtain a refund of payment made voluntarily, though under a mistake of law, (3) that the claim was barred by limitation under section 18 of the Madras Entertainments Tax Act. The learned City Civil Judge upheld the objections of the Government under all the three heads and dismissed the suit. Hence this appeal.

It is unnecessary to consider the correctness or otherwise of the view taken by the Assistant City Civil Judge on the question whether a party would be entitled to relief in respect of a payment under a mistake of law, or whether the suit claim was barred by the provisions of section 18 of the Madras Entertainments Tax Act as we are of opinion that his conclusion on the first point is correct.

The Madras Entertainments Tax Act was enacted to impose tax on amusements and other entertainments in the State of Madras. The relevant portions of the Act as it stood at the time when the payment of entertainment tax was made by the appellant to the Government are as follows :

Section 4 (1) states :

" On each payment for admission to any entertainment there shall be levied and paid to the State Government (except as otherwise expressly provided in this Act), a tax (hereinafter referred to as the entertainments tax) calculated at the following rates............

Provided that in the case of cinematograph exhibitions, the tax shall be calculated at the rates spesified above on each payment for admission, after excluding from such payment the amount of the tax ". (The rest of the seccion is omitted as unnecessary).

Section 7 (1) states :

" The entertainments tax shall be levied in respect of each person admitted on payment, and shall be calculated and paid on the number of admissions ".

Sub-clause (2) states :

" The entertainments tax shall be due and be recoverable form the proprietor ".

It will be seen that under the provisions extracted above the management of a cinema for example is made the collecting agent for the tax. The amount so collected is a tax on the individual attending the entertainment. It being a tax will be due to the Government and not to the proprietor of the cinema. There is however no evidence in this case to show whether the appellant collected the tax by adding the sum of one anna to a four anna ticket, or by collecting five annas in lump sum from the picture-goer undertaking to pay whatever tax that may be due thereon to the Government from out of the collections. Exhibit B-1 is a typical statement of the tickets sold. That gives only particulars of the number of tickets sold, total amount collected and the tax due thereon at one anna per ticket. It does not show that one anna was collected from each member of the audience on the representation that it was for entertainments tax. But the learned trial Judge has observed in his judgment thus :

" Further it will be seen that the collections of tax at the rate of one anna per ticket of 5 annas was made by holding out that it was payable to the Government. The seal or stamp on the ticket bears that the tax payable in one anna ".

The correctness of his statement has not been challenged in the grounds of this appeal. It would follow that although no five annas ticket during the relevant period has been produced in this case, the admitted case of both the parties was that those tickets contained an impression on it, that the entertainments tax payable thereon was one anna. Thus there was a representation to the individuals who attended the cinema that out of five annas collected for each ticket one anna was collected as and for the entertainments tax. It was this amount that was paid by the

appellant to the respondent. The amount so collected from the persons who attended the cinema was for paying it over as entertainments tax to the Government. If that amount was in excess of what was legally due, namely, three pies on each ticket, the excess would belong to the individual who had paid the money and not to the appellant, who merely collected the money on behalf of the State.

The management of a cinema is made by the statute an agent as it were for the collection of the entertainments tax; once the collection was made and the amount paid to the Government, the agency would cease. The agent himself would have no interest in the amount collected and paid over to the Government.

Learned counsel for the appellant contended that in the circumstances of the case it should be held that the sum of five annas collected in respect of each ticket was a consolidated sum; as the management did not allocate what was due to them, and what was due to the Government as and for the entertainments tax, the entire sum, would belong to the management subject to the duty of the management to pay the proper amount of tax to the Government; if under these circumstances, an excess was paid as tax it must be out of the moneys belonging to the management, who would therefore be entitled to recover the same on proving that there was a mistake of law in making the payment. We cannot however agree that what was collected in the instant case was a consolidated sum. While charging an individual picture-goer five annas for a particular seat the management in the instant case intended to charge only four annas for itself and one anna for the entertainments tax. While it may be accepted that what the appellant paid was in excess of what was due, the excess payment was not of the appellant's money but represented the excess collected from the various persons who attended the cinema shows during the relevant period by purchasing five annas tickets. The question whether a person entrusted by a statute with the duty of collecting a tax as a part of his business can be said to receive it as his business income, arose under the Madras General Sales Tax Act in *Velayudhan* v. *Agricultural Income-tax and Sales Tax Officer, Perumbavoor*[1]. Subramania Iyer, J., while considering the question whether a tax realised by a dealer from his customer could be included in the dealer's turnover thereby subjecting it to further tax observed:

> "The sales tax collected by the petitioner is immune from the levy of any sales tax as the collection was made by him for and on behalf of the State and his obligation was to make it over to the State on whose behalf he made the collection".

This view was affirmed in *Sales Tax Act Officer* v. *Velayudhan*[2]. In *Kunju Moideen Kunju* v. *State of Travancore-Cochin*[3], it was held that any amount collected by a registered dealer from his customers by way of tax due to the Government regardless of the fact whether the tax so collected was actually due on the sales or not was a collection which had to be handed over to the State. In *Deputy Commissioner of Commercial Taxes* v. *Krishnaswami Mudaliar*[4], a Bench of this Court holding that there could be no levy of sales tax on sales tax collected by a dealer observed that:

> "The dealer did nothing to the goods sold in order to enable him to earn the tax that is levied upon the sale. It is an obligation imposed by the State upon transactions of sale which liability is to be borne by the purchaser and the amount is to be collected by the seller not because he is entitled to it in his capacity as seller but because an obligation has been enjoined upon him to make the collection under the statute".

We have already referred to the relevant provisions in the Madras Entertainments Tax Act which shows that what is collected by the person providing the entertainment tax is a tax for being paid over to the Government. The circumstance that such tax is collected along with the admission fee for the particular entertainment cannot alter the nature of what is collected on behalf of the Government or of the obligation on the part of the person so collecting to transfer the entirety of the amount so collected from the public. The amount thus collected not being the income of the person providing the entertainment would not form his property

1. (1953) 4 S.C.T. 338.
2. (1954) 5 S.T.C. 285.
3. (1954) 5 S.T.C. 462.
4. (1954) 5 S.T.C. 88.

so that he can in case there is any payment by mistake recover it back. What was paid to the Government was what was collected on its behalf; if there was an excess collection made, the person aggrieved is the person who paid. The appellant could have no cause of action in respect of such excess collection which was made and paid over to the Government.

Agreeing with the lower Court, we are of opinion that the excess amount of tax paid to the Government by the appellant was not his property so as to entitle him to recover such excess payment from the Government. The appeal fails and is dismissed with costs.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

T. D. Jagadamba Bai and others .. *Appellants**

v.

T. D. Satyanarayana Rao *alias* T. D. Najunda Rao and others.. *Respondents.*

Hindu Law—Presumption as to the school of law applicable to migrating families—Migration—Inference and proof—Adoption by a widow belonging to family governed by Mitakshara law of Bombay State.

Hindu Law—Adoption by widow governed by the Southern school of Mitakshara law—Authority of husband or consent of agnates to adopt—Form and proof of authority or consent.

Evidence Act (I of 1872), *section* 115—*Estoppel and adoption—Practice—Issues in the absence of pleadings—Trial of—Propriety.*

A Hindu family may migrate from one place to another but the members of the family carry the personal law along with them. It may be open to the members of the family after such migration to give up and renounce the law which they carried with them and adopt the law prevailing in the place to which they have migrated. But until such an act of renunciation is positively established the presumption is that the members of the migrating family are still governed by the law of the place of their origin.

Actual proof of migration especially in relation to families which had migrated centuries ago will often be impossible. But an inference of migration may be possible depending upon the facts and circumstances of each case. It is also possible to draw an inference of migration from the fact that the parties have been persistently and invariably describing themselves in a particular way (in the instant case, as of the Maharashtra stock).

Since the widow in the instant case was governed by the Mitakshara law as obtaining in the Bombay State she can make an adoption to her deceased husband without his authority or permission so long as there is no prohibition against the widow taking a boy in adoption.

The Hindu law does not require the husband's authority in favour of his wife to make an adoption to be in any particular form. It need not be written; it may also be oral. But as a Hindu widow governed by the Southern school of Mitakshara law cannot adopt without the husband's permission or without the consent of the agnates or cognates any alleged oral permission has got to be strictly proved and convincingly established. Self-serving recitals in a document or declaration in writing cannot be accepted as proof of oral authority by themselves without proof aliunde establishing that as a fact.

One of the essential ingredients of section 115 of the Evidence Act is that the person who pleads estoppel must have acted on the representation made to him. It is only a rule of evidence. This rule cannot validate an invalid adoption.

The adoption was upheld in the instant case as the parties belonged to a family governed by Mitakshara law as obtaining in the Bombay State. Since the husband died before 1937, the widow was not entitled to any benefits under Act (XVIII of 1937) and though she married her own maternal uncle since she succeeded only as his wife, she got only a limited interest in the properties and the adopted boy was entitled to recover the entire properties.

A trial of an issue in the suit without the necessary foundation of the proper pleas raising the issue is a gross irregularity and an unmitigated evil likely to lead to miscarriage of justice.

Appeals against the decree of the Court of the Subordinate Judge of Thanjavur in O.S. No. 23 of 1955.

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* Appeal Nos. 61, 168 and 278 of 1957 — 31st January, 1961
C.R.P. No. 1675 of 1957. — (11th Magha, 1882—Saka)

Appeal No. 61 *of* 1957.

G. K. Damodara Rao, K. S. Naidu, R. Krishnamurthy and *P. Devadoss,* for Appellant.

R. Gopalaswami Ayyangar, for Respondents.

Appeal No. 168 *of* 1957.

V. Ramaswami and *T. Martin,* for Appellant.

R. Gopalaswami Ayyangar, for Respondents.

Appeal No. 278 *of* 1957.

T. R. Srinivasan and *V. Venkatesan,* for Appellant.

R. Gopalaswami Ayyangar, K. S. Naidu and *R. Krishnamurthi,* for Respondents.

C.R.P. No. 1675 *of* 1957.

R. Gopalaswami Ayyangar, for Petitioner.

K. S. Naidu, P. Devadas, T. Martin, N. Vanchinathan, R. Krishnamurti and *V. S. Gopalaraman,* for Respondents.

The Judgment of the Court was delivered by

Jagadisan, J.—These three appeals arise out of the same suit in O.S. No. 23 of 1955 on the file of the Subordinate Judge's Court of Tanjore. The first plaintiff in that suit claimed to be the adopted son of one T. B. Doss Rao, the deceased husband of the first defendant and sought recovery of possession of the properties described in the plaint A, B, and C Schedules as belonging to him as such adopted son. The first defendant denied the factum of the adoption itself, and contended that even if the adoption did in fact take place it was invalid in law. The second defendant was the alienee from the first defendant of items 1 and 2 of the plaint A Schedule. The third defendant was another alienee from the first defendant of items 29 and 35 of the plaint B Schedule. The fourth defendant was in occupation of the house described as item 3 of the plaint A Schedule and the 5th defendant was in occupation of the house described in the plaint C Schedule, as tenants under the first defendant. The 6th defendant was living in the house, item 49 of the plaint B Schedule. The 6th defendant was impleaded as a party subsequent to the institution of the suit as per order in I.A. No. 489 of 1955, dated 2nd August, 1955. She came to be added as a party by reason of the plea of the first defendant in her written statement that she is a necessary party and that the suit was bad without her joinder. The 6th defendant claimed to be the lawfully wedded second wife of the late T.B. Doss Rao. The first defendant supported the 6th defendant in her claim to be the widow of Doss Rao. All the defendants made common cause against the first plaintiff and denied his status as the adopted son of T.B. Doss Rao.

The second plaintiff in the suit claimed to be a purchaser from the first plaintiff of an undivided one-third share in all the suit properties. It seems to be plain that the second plaintiff who obtained the conveyance from the first plaintiff on 4th March, 1955, six days before the suit was instituted belongs to the class of financiers and speculators who promote litigation to subserve their own ends and purposes.

The learned Subordinate Judge of Tanjore who tried the suit upheld the first plaintiff's claim as the validly adopted son of the late T.B. Doss Rao. He found that the first plaintiff was not competent to challenge the validity of the alienation of item 1 of the plaint A Schedule. He further found that the alienation of other items of properties made by the first defendant and impugned by the first plaintiff were not valid and binding upon him. The first plaintiff was granted a decree for recovery of possession of all the properties described in the plaint Schedules A to C except item 1 of the A Schedule. The first defendant was directed to render accounts in respect of the income from the plaint properties, for which the first plaintiff was granted a decree, from 8th June, 1938 till date of alienation in respect of alienated properties and till recovery of possession regarding the other properties. An enquiry under Order 20, rule, 12, Civil Procedure, Code, was

directed to be held in respect of the determination of the future mesne profits payable by defendants 2 and 3.

The learned Subordinate Judge found that the 6th defendant was not the lawfully wedded wife of the late Doss Rao.

Appeal No. 61 of 1957 is the appeal preferred by the first defendant challenging the correctness of the finding of the Court below in regard to the status of the first plaintiff. The second defendant has preferred A.S.No. 168 of 1957 in so far as the judgment and decree of the Court below affects his rights over the second item of the plaint A Schedule. A.S. No. 278 of 1957 has been preferred by the 6th defendant contending that the finding of the Court below in regard to her alleged status as the wife of Doss Rao is not correct.

In A.S. No. 168 of 1957 a memorandum of compromise signed by the appellant and the second plaintiff has been filed into Court. These parties pray that the memorandum of compromise may be recorded and a decree in terms thereof be passed. The other two appeals were heard together.

T.B. Doss Rao, the late husband of the first defendant, was employed as a Sub-Magistrate for a long number of years under the State Government. He was promoted as a Tahsildar which office he held in several places in Tanjore district, Sirkali, Mannargudi and other places. At the time of his death on 3rd September 1934 he was holding office as Huzur Sherishtadar in the Tanjore Collectorate. He died issueless. The 6th defendant in the suit was living with him and the evidence on record seems to suggest that she was living as his wife, though the question whether she was married to him or not is not free from controversy. Rathnabai, the mother of the first plaintiff, is the daughter of one Ramachandra Rao, the junior paternal uncle of the first defendant. The first plaintiff's mother and the first defendant are therefore related as cousin-sisters. The natural father of the first plaintiff is one Narahari Rao, who was employed as a clerk in the Postal Department at Madras. The case of the first plaintiff is that the first defendant was anxious to adopt one of the sons of her cousin Rathnabai that she pressed his parents to give him away in adoption to her and that he was given away in adoption at Tanjore by his natural parents to the first defendant on an auspicious day, namely 8th June, 1938. As against this definite case of the first plaintiff of the first defendant having taken him in adoption on 8th June, 1938 in accordance with shastraic rites, the first defendant's equally definite case was that no adoption took place on 8th June, 1938 or at any time thereafter. The onus of proving the adoption is undoubtedly upon the first plaintiff. It must be mentioned even at the outset that the evidence in support of the factum of adoption of the first plaintiff, both documentary and oral, is overwhelming and it is indeed strange that the first defendant should have thought fit to deny such an incontrovertible fact. Of course her further plea was that the alleged adoption of the first plaintiff is invalid in law as she was not governed by the Mayukha Law of the Bombay school and as she had neither the authority of the husband nor the consent of sapindas to make the adoption to her deceased husband. This plea attacking the validity of the adoption was set out in the written statement filed by her. At the trial of the suit she adopted another line of defence as well, though not pleaded in her written statement. She suggested that the boy actually taken in adoption was not the first plaintiff but another son of the first plaintiff's parents who is no longer alive.

We shall very briefly refer to the evidence relating to the factum of adoption of the first plaintiff to the late Doss Rao just to express our concurrence with the finding of the learned Subordinate Judge on this issue in the case. The first plaintiff who was a mere baby, aged about 2½ to 3 years at the time of the alleged adoption was brought up by the first defendant herself. Exhibit A-20, letter written by the first defendant to the first plaintiff's father, dated 26th June, 1937 shows that the first plaintiff was with her on the date of that letter. In Exhibit A-21 dated 2nd August, 1937 written by the first defendant to the first plaintiff's father the first defendant states that the first plaintiff's father need not be thinking of him as the first plaintiff is always going to be with her. The first defendant wrote Exhibit

A-8, dated 22nd May, 1938 to the first plaintiff's father fixing 26th Vaikasi of the year Vehudanya (8th June, 1938), a Wednesday as an auspicious date for taking the boy in adoption. Exhibit A-1 is the printed invitation sent in the name of the first defendant fixing 8th June, 1938 as the date of the adoption ceremony. This is produced by Baji Rao, P.W.3, one of the witnesses examined on the side of the plaintiffs. Exhibit A-2 is the ante-adoption agreement dated 7th June, 1938 between the first plaintiff' father and the first defendant. This was executed at Tanjore and registered on 7th June, 1938 itself. This document recites that Satyanarayana, aged about 2½ years, the son of Narahari Rao, is to be taken in adoption and that after the adoption he should take all the immovable properties purchased by the late Doss Rao during his lifetime absolutely. Under the document the immovable properties purchased by the first defendant after the lifetime of her husband were to be taken by her absolutely. The document further provided that the first defendant should be the guardian of the adopted son till he attained majority, and that after her lifetime, if the adopted son still continued to be a minor, the natural father of the boy should be the guardian. Exhibit A-3 dated 8th June, 1938 is the deed of adoption executed by the first defendant. That document recites that the late Doss Rao before his death gave his wife permission to adopt under the Mayukha Law and that on 8th June, 1938 Satyanarayana, the son of Narahari Rao and Rathna Bai, was given away by his parents in adoption to her, that Datta homam was performed according to the Shastras and that the adopted son's rights in respect of immovable properties of Doss Rao should be governed as per the recitals in the ante-adoption agreement, Exhibit A-2. The adopted boy is described in the adoption deed as Satyanarayana *alias* Nanjunda Rao. These documents would *prima facie* show that in fact the first plaintiff whose name is Satyanarayana was taken in adoption on 8th June, 1938 by the first defendant.

Before the institution of the suit the first plaintiff caused a notice Exhibit A-38 dated 9th July, 1954 to be issued to the first defendant through his Counsel at Madras, in which he asserted his status as an adopted son and demanded recovery of possession of the immovable properties belonging to his late adopted father. The first defendant caused a reply to be sent through her lawyer at Nagapattinam which is Exhibit A-39 dated 15th September, 1954. It must be noted that the first defendant was not diligent in sending this reply as she kept quiet for nearly two months after receipt of Exhibit A-38. Paragraph 8 of that reply notice reads as follows :—

"That there was no giving and taking as required by law to constitute a valid adoption and no Dhatha homam and other ceremonies were performed; as my client was then in her monthly course and therefore, the adoption had to be postponed till after she took her bath three days later."

In the written statement filed by the first defendant in the suit there is no reference to this alleged postponement of the adoption ceremony due to the intervention of her monthly period on that date. The adoption deed, Exhibit, A-3, was registered only on 10th June, 1938. This delay of two days in registering the adoption deed was taken hold of by the first defendant to evolve this ingenious plea of the postponement of the adoption ceremony on 8th June,. 1938. The oral evidence in support of the adoption ceremony not having taken place on 8th June, 1938 is that of the first defendant herself as D.W. 4 and that of D.W. 5 who claimed to be a relation of the first defendant's husband. The evidence of the first defendant is certainly interested and cannot be accepted as true. The learned Subordinate Judge who saw D.W. 5 in the witness-box discredited his testimony as false. We see no reason to accept his testimony. The first defendant stated in the witness-box that she had her periods on 8th June, 1938 in the regular course and that it was not unexpected. It was the first defendant who fixed up the auspicious date by consulting her purohit at Tanjore for the adoption ceremony. As the learned Subordinate Judge has rightly pointed out it is unbelievable that the first defendant would have fixed any date for an auspicious occasion in which she was to participate at a time when she expected her monthly periods. The story of the first defendant of the postponement of the adoption ceremony on 8th June, 1938 is hopelessly false and is incredible.

The oral evidence on the side of the plaintiffs relating to the factum of adoption is very cogent and natural. P.W. 1 Krishnan Nair was employed under Doss Rao as a cook for a long number of years. He deposed that he accompanied Narahari Rao from Madras to Tanjore and witnessed the adoption ceremony. The presence of P.W. 1 on 8th June, 1938 is admitted by the first defendant herself. In her letter Exhibit A-18, dated 22nd May, 1938 addressed to the first plaintiff's father she asked him to inform P.W. 1 of the intended adoption ceremony to come off on 8th June, 1938. The first defendant's letter Exhibit A-29, dated 15th June, 1938 written 7 days after the adoption ceremony shows that Krishnan Nair, P.W. 1 remained at Tanjore till the date of that letter. P.Ws. 2, 3 and 5 also deposed that they were present at the adoption ceremony and witnessed the giving away of the first plaintiff by his parents to the first defendant. We cannot discredit the testimony of these disinterested witnesses against whom nothing has been suggested to doubt their veracity. The learned Subordinate Judge has accepted their testimony and we see no reason to differ from him in this respect.

The first defendant wanted to make out at the trial of the suit that the first plaintiff was not the boy who was taken in adoption by her. This was not her plea in her written statement wherein she took up the extreme impossible position that there was in fact no adoption at any time by her of the first plaintiff. She did not plead that some other son of the parents of the first plaintiff was taken in adoption. The learned Subordinate Judge ought not to have permitted the first defendant to adduce any evidence on the question of the identity of the boy who was taken in adoption in the absence of a specific plea in this behalf. A trial of an issue in the suit without the necessary foundation of the proper pleas raising the issue is a gross irregularity and an unmitigated evil likely to lead to miscarriage of justice. However, this question of the identity of the boy taken in adoption was raised at the trial of the suit, though irregularly and improperly, and as we have heard strenuous arguments of learned counsels in this Court we propose to consider the question.

The evidence on the side of the plaintiffs is that the first plaintiff was born on 6th July, 1935 at Madras. Exhibit A-4 is the triplicate copy of the report of birth of the first plaintiff given to the Corporation of Madras by his father, Narahari Rao, P.W. 4. Exhibit A-5 is the extract from the birth register of the Corporation maintained in the 13th Division, said to relate to the first plaintiff. If Exhibits A-4 and A-5 relate to the first plaintiff his date of birth is 6th July, 1935. Exhibit A-2 the ante-adoption agreement gives the age of the adopted boy as about 2½ years. It is not disputed that the approximate age of the adopted boy given in Exhibit A-2 is correct. The adopted boy, whether it was the first plaintiff or some other boy, must therefore have been born sometime in 1935 or 1936. The evidence of P.W. 4 and P.W. 6 the natural father and mother of the first plaintiff is to the effect that they had seven children in all, three male and four female, but that two of the female children died. According to them the first plaintiff is their second male issue. The first boy is one Gopinath born in 1927. The third boy is one Mohan born sometime in or about October, 1937. The birth extract in regard to this third boy has not been made available. The first defendant herself has admitted that at the time when Rathnabai, the first plaintiff's mother, came to Tanjore to participate in the adoption ceremony she had a son, a baby in arms. The first defendant in her letter Exhibit A-47 dated 3rd October, 1937 addressed to the first plaintiff's natural father expressed her pleasure in hearing the news of the birth of a male child to him. It is therefore very likely that the male child referred to therein is the third son of the first plaintiff's parents, namely, Mohan. The story of the first defendant that the first plaintiff was not the boy who was taken in adoption rests partly upon her interested dubious testimony to which we shall refer to presently and on the declaration made by the first plaintiff's father in regard to the age of the first plaintiff while admitting the first plaintiff in the schools. The first defendant as D.W. 4 deposed thus :—

"First plaintiff is not the boy that was proposed to be adopted. Satyanarayana Rao the proposed boy for adoption was of darker complexion than first plaintiff and he had mole near his left ear."

The first defendant seems to be a woman who will not shrink from uttering any falsehood as is evident from the fact that she denied the very factum of adoption. We cannot certainly disbelieve the first plaintiff's adoption on the oral testimony of the first defendant suspecting the identity of the first plaintiff as the adopted boy on degrees of complexion and on the existence or otherwise of a mole on the left ear.

The first plaintiff was admitted as a student in the Madras Progressive Union (Secondary) School. The application for admission is Exhibit C-3 and that gives the date of birth of the first plaintiff as 15th June, 1937. This application purports to be signed by the father of the first plaintiff. The first plaintiff was admitted later on as a student of the North Tondaimandalam T. V. High School. The application for this admission is Exhibit C-5 and that also gives the date of birth of the first plaintiff as 15th June, 1937. There is a declaration purporting to be signed by the first plaintiff's father in Exhibit C-5, that the statement given by him in the application is correct. Exhibit C-2 is a declaration over the alleged signature of the first plaintiff's father and that is as follows :

"I hereby declare that the correct date of birth of my boy Satyanarayanan, J., of Form IV is 15th June, 1937 (nineteen thirty-seven) and that no alteration of the date will be demanded in future on the plea that the correct date was not given at the time of admission."

The first plaintiff's father while admitting his third son Mohan in the Progressive Union School has given a declaration in respect of his age as well. In Exhibit C-1 which is the application for admission into the Progressive Union High School the date of birth of Mohan is given as 14th July, 1941. Exhibit C-4 is the application for admission of Mohan in Tondaimandalam T. V. High School giving the date of his birth again as 15th July, 1941. The S.S.L.C. book relating to the first plaintiff Exhibit C-7 also repeats his date of birth as 15th June, 1937. These extracts from the school registers undoubtedly show the first plaintiff's date of birth as 15th June, 1937 and the date of birth of his younger brother Mohan as 15th July, 1941. P.W. 4 the father of the first plaintiff had naturally an uncomfortable time in the witness-box when he was confronted with these entries relating to the dates of birth of his two sons. The material portion of his evidence in this connection is as follows :

" I admitted the boy in Progressive Union School at Madras to join him in IV Class. I did not sign the admission form. My first boy admitted the boy. I do not know whether an application was necessary. I do not remember whether my boy signed any form. I do not remember whether I signed any form when I joined the first boy. I have admitted the third boy in School. Then I had leisure and I signed the form. I must see the form to tell the particulars to be filled."

No attempt was made to confront P.W. 4 with his signatures in Exhibit C series referred to above. Nevertheless the above passage from his testimony reveals a good deal of hesitancy and prevarication on his part. This is indeed not commendable. The evidence of D.W. 7 who was the Headmaster of the Progressive Union High school from 1922 to 1950 is quite clear on the authenticity and genuineness of the documents Exhibit -C series. D.W. 7 deposed as follows :

" I know Sri J. Narahari Rao. He is the father of the first plaintiff J. Satyanarayana Rao. I can identify his signature as I am acquinted with the same. Exhibits C-1 to C-3 are shown to witness. Narahari Rao has signed in Exhibits C-1 to C-3. Naraharai Rao has also signed Exhibit C-5. In the S.S.L.C. book Narahari Rao's declaration signed by him is pasted. The S.S.L.C. book is Exhibit C-7."

In cross-examination the answers of this witness were as follows :

" I know Narahari Rao's signature only from the application forms given by him for the school. Generally parents come to present application forms. Narahari Rao must have come to present Exhibit C-3. I cannot remember if Narahari Rao came in person or sent it through his son Gopinatha Rao. I had no connection with T. T. V. High School. I was not present when Narahari Rao presented Exhibit C-4. I was not Headmaster when Narahari Rao signed Exhibit C-6."

It is obvious that at least with regard to the application form presented before the the Madras Progressive Union High School of which D.W. 7 was the Headmaster at the relevant period Narahari Rao must have signed the application form, and he must have given the date of birth of the first plaintiff as 15th June, 1937 and that of his another son Mohan as 15th July, 1941.

Learned counsel for the appellant contended that the age of the first plaintiff contained in the school registers and as declared solemnly by his own father must be taken to be true and that at the time of the adoption on 8th June, 1938 he must have been the baby in arms of his mother Rathna Bai and that the boy adopted must have been a boy elder in years to him. If this was the true state of affairs then the parents of the first plaintiff must have begotten four male children. The evidence on the side of the plaintiffs is that Narahari Rao and Rathana Bai had only three male children. The evidence on the side of the contesting defendants as to what happened to the adopted boy if the first plaintiff was not the boy taken in adoption is mysteriously silent. There is some vague suggestion put to P.W. 2 that the boy must have died and of course no extract from the death register is produced. No such suggestion was made to P.W. 4 or P.W. 6 when they were in the witness box. It is impossible to hold that the first plainiff was not the boy adopted merely by taking into account the age of the first plaintiff as given in Exhibits C-3, C-5, C-6, C-7 and also C-8. We agree with the learned Subordinate Judge that it is not uncommon for parents to make declaration of lesser age in regard to their children than their real age having in view the prospect of entering into Government service or sitting for competitive examinations which always prescribes an age limit. It is true that the first plaintiff's father was not candid enough to give this explanation in having given a wrong underage in respect of the first plaintiff. But in view of the other positive evidence and the probabilities and circumstances of the case, we have no hesitation in holding that the real date of birth of the first plaintiff was 6th July, 1935 as evidenced by Exhibits A-4 and A-5 and not 15th June, 1937 as mentioned in Exhibit C series.

According to the evidence on the side of the plaintiff's the first plaintiff was given a new name Nanjunda Rao when he was adopted. Exhibit A-3 the adotion deed describes the adopted boy as Satanarayana *alias* Nanjunda Rao. The school registers Exhibit C series referred to above described the first plaintiff only as Satyanarayana. It must be mentioned that the school registers referring to the first plaintiff do not describe him as the adopted son of Doss Rao but only as the son of Narahari Rao. These circumstances are strongly relied upon by the learned counsel for the appellant in support of his contention that it was not the first plaintiff who was adopted. The first defendant in her letters addressed to the first plaintiff's father, Exhibit A-29 dated 15th June, 1938, Exhibit A-30 dated 20th June, 1938, Exhibit A-31, dated 25th June, 1938 and Exhibit A-44 dated 26th July, 1938 all written after the date of adoption referred to the adopted boy as Nanjunda Rao. The first defendant herself has admitted in the witness-box that though the adoption ceremony did not take place the first plaintiff and his sister Vimala were with her for about 10 months after 8th June, 1938. In her letter Exhibit A-32 dated 7th August, 1938 written to the first plaintiff's father she categorically asserted that she will not have the *thithi* of her late husband and Mahalayam performed without the presence of the adopted boy. We are not convinced that the conduct of the first plaintiff's father in not putting forward the first plaintiff as the adopted son of Doss Rao while admitting the first plaintiff to schools is sufficient to detract from the other mass of evidence and the compelling probabilities tending to establish the truth of the adoption of the 1st plaintiff.

Learned counsel for the appellant-first defendant also commented upon the inordinate delay on the part of the plaintiffs in putting forward the first plaintiff's status as the adopted son and in claiming to recover possession of the suit properties. The fact that the first plaintiff's father was indifferent perhaps due to quarrels and misunderstandings with the first defendant cannot take away the rights of the first plaintiff, who at any rate became diligent and active after he attained majority on 6th July, 1953. The denial by the 1st defendant of her having made any adoption to her late husband and her attempt to say that the boy adopted was not the first plaintiff constitute remarkable effrontery on her part. In our judgment the first plaintiff was in fact given away in adoption by his parents and taken by the first defendant as the adopted son of her late husband Doss Rao.

The first defendant pleaded in her written statement that she was coerced into signing the ante-adoption agreement and the deed of adoption, Exhibits A-2 and A-3 by threats and misrepresentations made by Narahari Rao, the first plaintiff's father and that she was also the victim of fraud practised upon her by Narahari Rao and his partisans. The first defendant is not an illiterate lady. The letters written by her to Narahari Rao are signed by her in English though the body of the letters is in the Tamil language. She admitted in the witness-box that the ante-adoption agreement was read out to her at the time of the registration of the document. The evidence shows that she was very keen in bringing about the adoption to her late husband and that one Bava Gopalaswami Mudaliar who was the friend of her late husband took a keen interest in the matter. He has attested both Exhibits A-2 and A-3. It is impossible to believe that the first plaintiff's father who was a clerk in the Postal Department with a very moderate salary and who was burdened with a large family could have been in a position to dominate over the will of the first defendant or to practise deceit and imposition upon her especially when other respectable persons were helping her with advice and guidance. We have no hesitation in holding that the first defendant has failed to prove that she was not a free agent in executing Exhibits A-2 and A-3.

The adoption of the first plaintiff though proved to have been effected and brought about in due conformity with all the ceremonies and rituals appertaining to the function under the Hindu Law cannot be valid in law unless the first plaintiff is able to establish that the first defendant had the authority of her deceased husband to make the adoption or that the parties are governed by the Bombay School of Hindu Law (Mayukha Law), under which a Hindu widow is enabled to adopt of her own volition even without the authority of her deceased husband.

We shall first examine whether in fact the first defendant was authorised by her husband Doss Rao to take a boy in adoption to him after his death. In the plaint the first plaintiff averred that Doss Rao authorised the first defendant before his death in the presence of some respectable persons to adopt a son to himself. The first defendant denied this in her written statement by making the averment that there was no wish expressed by Doss Rao that she should take any boy in adoption. The allegation in the plaint alleging the existence of oral authority given to the first defendant by her husband, has not been substantiated by adducing any oral evidence. The respectable persons referred to in the plaint remain anonymous till today. What is relied upon by the first plaintiff in support of this oral authority by Doss Rao is recital in Exhibits A-2 and A-3 stating that the first defendant had the permission of Doss Rao before his death for taking a boy in adoption on his behalf. Reference is also made to Exhibit A-6, dated 24th November, 1937 which is a letter written by Bava Gopalaswami Mudaliar to the first plaintiff's father. Therein the following sentence occurs :

"She (the first defendant) says that her husband Mr. Doss Rao has given her permission to adopt and he has suggested some children and your sister-in-law prefers your child because it is her sister's child and you all will be helpful to her."

Bava Gopalaswami Mudaliar who was alive during the trial of the suit was not called as a witness by either side. This letter cannot be evidence of the fact of oral authority in favour of the first defendant to make an adoption. It cannot have a higher evidentiary value than the assertion made by the first defendant herself in the two solemn documents, Exhibits A-2 and A-3. The first defendant giving evidence in the case as D.W. 4 has denied categorically that her husband authorised her to adopt a boy to him. It may be that her present denial cannot be safely acted upon as her credentials for speaking the truth are not high. She is certainly interested in this action to deny the oral authority of her husband if any, to defeat the adoption pleaded by the first plaintiff. We are unable to hold that the mere recitals in Exhibits A-2 and A-3 can be taken as evidence establishing the truth of the oral permission alleged to have been given by Doss Rao to the first defendant. The Hindu Law dos not require the husband's authority in favour of his wife to make an adoption to be in any particular form. It need not be written ; it may also be oral. But as a Hindu widow

governed by the Southern School of Mitakshara Law cannot adopt without the husband's permission or without the consent of his agnates or cognates any alleged oral permission has got to be strictly proved and convincingly established. Self-serving recitals in a document or self-serving declarations in writing cannot be accepted as proof of oral authority, by themselves without proof *aliunde* establishing that as a fact. In *Raja Mahadeva Rayal* v. *Raja Veerabasava Chikka Rayal*[1], the Judicial Committee held that mere assertion made by a widow that she had the authority of her husband to adopt without making any effective endeavour to support it except by carrying out the adoption is not sufficient evidence to establish that the widow had the authority of her husband to adopt. We are of opinion that the first plaintiff upon whom the burden of proving his status undoubtedly rests, has failed to prove that the first defendant had the authority of her husband to make the adoption.

R. Gopalaswami Iyengar, learned counsel for the respondents-plaintiffs contended that the first defendant was estopped from denying any authority of her late husband in view of the representation made by her in Exhibits A-2 and A-3 of the existence of such authority which had been acted upon by the first plaintiff and his parents so as to bring about an alteration of status. In support of his proposition of law learned counsel referred us to the decision of the Judicial Committee in *Dharam Kunwar* v. *Balwant Singh*[2]. In that case a Hindu widow took a boy in adoption in pursuance of an alleged authority in her favour given by her late husband. The fact that the husband gave authority to the widow was not in dispute but what formed the subject-matter of the controversy between the parties was the scope and extent of the authority so given. The widow after having taken the boy in adoption and having treated the adoptee as the adopted son for a long time denied his status and filed the suit for a declaration that he is not the adopted son. The adopted son Balwant Singh contested the suit raising various pleas one of which was that the plaintiff-widow was estopped from denying the authority of her husband. Lord Robson dealt with this question and observed as follows :—

"Of course, the estoppel pleaded against the Rani must be taken as purely personal. It does not bind any one who claims by an independent title, but, in view of the decision now given, that the respondent was, in fact, duly adopted, further litigation on the point may be taken as happily out of the question. So far as the Rani herself is concerned it would indeed be difficult to have a stronger case of estoppel. She has asserted her authority in the most solemn manner under her hand and seal, and her conduct both before and after that assertion had been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to those who have acted in reliance upon her deliberate and repeated representations. The respondent is now severed from his natural family; he has undergone a change of social status which may or may not be beneficial to him, but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him."

The law of estoppel as embodied under section 115 of the Indian Evidence Act is of general applicability and if the facts of a particular case satisfy the requirements of that provision the bar of estoppel cannot but be attracted. In a subsequent case reported in *Dhanraj Joharmal* v. *Soni Bai*[3], the Judicial Committee had again to consider the plea of estoppel raised in connection with the status of an individual as an adopted son. At page 241 Justice Ameer Ali observed thus :

"What are the declarations acts or omissions of Ramdhan which are said to constitute the estoppel ? It is not necessary to decide in this case whether a status that rests on religious rules and religious sanctions and involves the performance of religious duties can be established by mere estoppel."

Referring to the case in *Dharam Kunwar* v. *Balwant Singh*[2], and cases of like description the learned Judge observed thus at page 243:

"A number of rulings of this Board and decisions of the Madras High Court have been referred to in support of the contention that the plaintiff is estopped. Closely examined, it will be seen that those cases relate to adoptions acquiesced in and recognised for a number of years by the person making the adoption, and the Courts considered in substance that a long course of recognition and

1. I.L.R. (1949) Mad. 72 : A.I.R. 1943 P.C. 114.
2. (1912) 23 M.L.J. 200 : L.R. 39 I.A. 142 : I.L.R. 34 All. 398 (P.C.).
3. (1925) 49 M.L.J. 173 : L.R. 52 I.A. 231 : I.L.R. 52 Cal. 482 (P.C.).

acquiescence on the part of the person, who was the best acquainted with the circumstances, gave rise to the inference that the conditions relating to the adoption were duly fulfilled. In *Dharam Kunwar* v. *Balwant Singh*[1], the estoppel was considered purely personal."

Mayne in his *Hindu Law*, 11th edition, at page 274 sets out the legal position thus :

" But estoppel does not convert an invalid adoption into a valid one. It is only a rule of evidence which under certain special circumstances can be invoked by a party to an action."

Again at page 276 it is observed :

" Neither the Law of Estoppel nor the Statute of Limitation can make a person an adopted son if he is not one."

The first plaintiff cannot establish the validity of his adoption by relying upon the bar of estoppel against the first defendant. One of the essential ingredients of section 115 of the Indian Evidence Act is that the person who pleads estoppel must have acted on the representation made to him. There is no evidence to show that the parents of the first plaintiff acted upon the representation made by the first defendant of the existence of an oral authority in her favour to adopt. Exhibits A-2 and A-3 also contain the averment of the first defendant that she is governed by the Mayukha Law of the Bombay School. It may be that the plaintiff's parents acted upon this representation and were consenting parties to give the first plaintiff in adoption. The question of estoppel is a mixed question of fact and law and in the absence of clear unequivocal evidence proving that the parents of the first plaintiff acted only on the representation of the first defendant of the existence of the oral authority to adopt the plea of estoppel raised must fail.

We have next to consider the question whether the parties are governed by the Hindu Law prevailing in the Maharashtra country of the Bombay State part of which follows the *Law of Vyavahara Mayukha of Nilakanta* and part of which is governed by the *Mitakshara*. The case of the first plaintiff is that both himself and the first defendant are governed only by the Hindu Law as administered in the Maharashtra country of the Bombay State and not by the law prevailing in the Southern State of Madras which is sometimes described as the Dravidian school of Mitakshra. It is now settled law that a Hindu widow governed by the Mayukha Law or by the Mitakshara as obtaining in the Bombay State can make an adoption to her deceased husband without his authority or permission so long as there is no prohibition against the widow from taking a boy in adoption. In *Yadeo* v. *Namdeo*[2], the Judicial Committee held that in the Mahratta country of the Bombay Presidency and in Gujerat a Hindu widow, whose husband has not expressly forbidden her to adopt a son to him, has power to do so, without authority from her husband and without the consent of her husband's kinsman, whether or not her husband's estate is vested in her, and whether or not he died separated. At page 13 the Judicial Committee observed thus :

" It has been decided by the High Court at Bombay that in Maharatta country of the Presidency of Bombay and in Gujerat a Hindu widow, who is sole or joint heir to her husband's estate, may adopt a son to her deceased husband, without authority from her husband, and without the consent of his kindred, or of the caste or of the ruling authority but that she cannot adopt where her husband has expressly forbidden an adoption. That is not now disputed ; it is undoubtedly the law."

Their Lordships of the Judicial Committee expressed the view that a Hindu widow of a deceased coparcener of an undivided family also had the same privilege and right to make an adoption.

In *Maharaja of Kolhapur* v. *Sundaram Iyer*[3], a Division Bench of this Court expressed the same view, following the decision of the Judicial Committee. At page 65, Spencer, Officiating Chief Justice observed thus :—

" The established law of Bombay as expounded by the Privy Council on the strength of all these authorities is that in that Presidency a widow can adopt even without being authorised by her husband or his kinsmen provided that he has not prohibited it. These law books only reproduce the pre-existing custom of the country. They do not enact a new law."

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1. (1912) 23 M.L.J. 200 : L.R. 39 I.A. 142 : I.L.R. 34 All. 398 (P.C.).
2. (1921) 42 M.L.J. 219 : L.R. 48 I.A. 513 : I.L.R. 49 Cal. 1 (P.C.).
3. (1924) I.L.R. 48 Mad. 1.

It is therefore clear that if the parties in this action are to be governed by the Hindu Law prevailing in the Mahratta country of the State of Bombay, the first plaintiff's adoption to the late Doss Rao, the truth and factum of which we have upheld, is valid in law. But if the parties are to be governed only by the Hindu Law prevailing in the State of Madras wherein the parties are now domiciled the first plaintiff's adoption though true cannot be valid in law as we have found that the alleged oral authority by Doss Rao in favour of the first defendant to make the adoption has not been established. The proper school of Hindu Law to be applied to the parties has therefore become a very material issue in the case.

There is no *lex loci* in India governing succession to and devolution of properties. The Hindu Law with all its ramifications and classification into various schools of law and as shaped and altered by frequent enactments of the Legislature of the country is still a personal law. This personal law is a part of the status of every Hindu family. A Hindu family may migrate from one place to another but the members of the family carry the personal law along with them. It may be open to the members of the family after such migration to give up and renounce the law which they carried with them and adopt the law prevailing in the place to which they have emigrated. But until such an act of renunciation is positively established the presumption is that the members of the migrating family are still governed by the law of the place of their origin. Mayne in his *Hindu Law*, 11th edition, at page 89, sets out the position relating to migrating Hindu families as follows:

"*Prima facie*, any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu Law recognised in that province. In Bengal and Assam, he is governed by the Dayabhaga School of Hindu Law; in the Mithila country in Bihar, by the Mithila law; in the rest of Bihar, in the district of Benares and in the Central, North Western and Northern India, by the law of the Benares school; in Guzerat, in the island of Bombay and in North Konkan, by the Mayukha law; in the rest of the Bombay province by the Mitakshara and the Mayukha and in Southern India, by the law of the Dravida School..............But this law is not merely a local law. It becomes the personal law, and a part of the status of every family which is governed by it. Consequently where any such family migrates to another province, governed by another law, it carries its own law with it, including any custom having the force of law. That law is the law existing at the time of migration..........Of course, it is open to the family to adopt the law of its new domicil which will have to be affirmatively proved. Where however the emigration is to a different country the presumption that the family has adopted the law of the people among whom it has settled will be more readily made, if it is shown that the members of the family have so acted as to raise the inference that they definitely cut themselves off from their old environment."

The question as to what is the proper school of Hindu Law applicable to a Hindu family can arise only in respect of families which have migrated from one part of the country to another. Proof of migration therefore seems to be an essential factor the absence of which will lead to the inference that any particular Hindu family will only be governed by the school of Hindu Law prevailing in the State where the family is found residing. In *Soorendranath Roy* v. *Mussamut Heeramonee Burmoneah*[1], the question for consideration was whether the parties were governed by the Dayabhaga Law or by the Mitakshara Law. The family came into Bengal from a distant part of India where the Mitakshara prevailed. On the question of migration the Judicial Committee observed thus at page 95:

"From the admissions in the pleading, referred to by the High Court in their Judgment, and from the evidence, it may be safely concluded that his family came from a part of India where the Mitakshara was and is the prevailing authority; that it came not unattended by Ministers of religion, and that it originally continued in Bengal its ancient law."

Their Lordships observed that an adherence to family usages is a strong Oriental habit, and held that the presumption is that the members of a family migrating from one part of the country to another continue their old family customs, and that the onus will be upon a party who alleges cessation of such custom to prove that fact.

In *Srimathi Rani Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*[2], it was held by the Judicial Committee that a Hindu family migrating from one part of India to another is presumed to continue to observe the Shastras by which it had been

1. (1868) 12 M.I.A. 81. 2. (1902) I.L.R. 29 Cal. 433 : L.R. 29 I.A. 82 (P.C.).

governed ; and that on the evidence of that particular case that presumption had not been displaced. At page 96 the Judicial Committee observed thus :

" The tenacity of such customs, even under the strain of migration, has been repeatedly recognised by the law in question such as the present. Accordingly, the question being primarily one of personal as distinguished from geographical custom, it is of the first importance to inquire of the origin of the family. Now, amid a mass of contradiction on almost everything else, it is undisputed that these people came from the north-west. Tradition names Dharanuggur as their original home ; but the precise place is of no moment, for it is not suggested that in any place in the North-West does the Dayabhaga prevail. The presumption, therefore, is that the family continued to observe the Mitakshara, and it remains to see whether the contrary has been proved."

In *Balwant Rao* v. *Baji Rao*[1], a Brahmin whose ancestors lived in Maharashtra in the Bombay Presidency died while on a pilgrimage leaving immovable property in the Central Province to which his daughter succeeded. In suits in which the daughter's sons sought to set aside alienations made by her the Court of the Judicial Commissioner found that the deceased brahmin had not an exclusive domicile either in Berar (where succession is governed by the law prevailing in the Bombay Presidency) or in the Central Provinces and held that the succession must therefore be governed by the law prevailing in Central Provinces where the property was situated. There was no evidence of renunciation of the law prevailing in the Bombay Presidency. The Judicial Committee held that the question was not one of domicile and that the daughter took an absolute estate in accordance with the law applied in the Bombay Presidency. Lord Dundein delivering the judgment of the Board set out the legal position thus at page 219 :

" Now it is absolutely settled that the law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question. It is well put by Mr. Mayne in paragraph 48 of his *Hindu Law*...............Now it is certain that Bapuji, did not originally live in Chikni, the place where he was actually living when he started on the pilgrimage in the course of which death overtook him. He was an immigrant. What law did he bring with him ? Of course, if nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place. In that sense only is domicil of importance. But if more is known, then in accordance with that knowledge his personal law must be determined ; unless it can be shown that he has renounced his original law in favour of the law of the place to which he migrated. What are the facts here ? Of renuniciation there is no trace whatever. Now it is found clearly by both learned Judges that Bapuji was a Maharashtra Brahman. The District Judge says so in the first sentence of his Judgment. The Judicial Commissioner says : ' It is common ground that Bapuji's ancestors had at one time lived in Maharashtra, in the Bombay Presidency. It is not known whether Bapuji had himself emigrated, or whether his ancestors had done so '. In the opinion of their Lordships, that in this case settles the matter. His family was according to this admission subject to the law as expounded in Bombay."

Is there any proof of migration on the part of the ancestors of Doss Rao or the ancestors of the first defendant or the ancestors of the first plaintiff from the Mahrashtra Country to the Madras State? P.W. 4 the first plaintiff's father deposed thus in examination in chief :

" I belong to Kshatriya Non-Brahmin Maharatta caste. My grandfather and great grandfather had come and settled down in Madras from Poona. My wife and first defendant are daughters of brothers."

In cross-examination he deposed as follows :

" I was born in Madras. My father's ancestors belonged to Poona. There is no record to show that my ancestors were in military service. My father died about 25 years ago. My father used to say often that we come from Poona side, whenever topics arose. There is no witness now to say that we came from Poona side. There is no correspondence between me and Poona side."

P.W. 3 Baji Rao is a Maharashtra. He deposed that his father used to say that his family has migrated from Poona, though he himself was born in Madras. He stated that the surname of his family is Selar and it was in that family that the wife of Shivaji the great was born. He is related to the first plaintiff's father and the relationship is that the first plaintiff's father is the maternal uncle's son of the brother's wife of the witness. In cross-examination he deposed as follows :

" I do not know when the ancestors of Narahari Rao and Doss Rao came from Maharatta country. I can't say whether they came from Maharatta, Narahari told me so. I do not know personally anything."

1. (1920) 39 M.L.J. 166 : L.R. 47 I.A. 213 : I.L.R. 48 Cal. 30 (P.C.).

The first defendant as D.W. 4 deposed as follows:

> "I am not a pure Mahratta and I am Mahratta and Tamilian. In the documents executed by me and taken by me I have been described as one belonging to the Mahratta community. In the affidavits filed in this Court I have described myself as belonging to that community. Doss Rao has also described himself as of that community in the documents. In the affidavits and written statements I gave instructions to describe me as a Mahratta, as my husband had described himself like that. I cannot say whether I am Tamilian or not. My people would not marry in the Mudaliar, Pillamar or Naidu community. I talk Mahratti language at home. I do not know whether there (are) my relations at Poona. I had not gone there................Most of my relations are at Thanjavur. I do not know wherefrom their ancestors came and settled at Thanjavur."

In all the documents to which Doss Rao was a party he was invariably described as a Mahratta. The first defendant as admitted by herself also consistently described herself only as a Mahratta on every occasion. The first plaintiff and his father have also been describing themselves as Mahrattas throughout. Amidst the strong currents and cross-currents of unabashed falsehood resorted to by the parties in this action manoeuvring for favourable position in the conduct of this litigation, this feature of the description of the parties as Mahrattas clearly emerges and remains unblurred. In Exhibit A-38, the suit notice given on behalf of the first plaintiff to the first defendant, it was observed as follows:

> "Doss Rao had no issue, he gave you authority to take a boy in adoption, that you being Maharashtra, Kshatriyas of Bombay Presidency, the Mayukha law is applicable to you under which widows can take a boy in adoption without the authority of the husband or the consent of his sapindas......"

Even in the belated reply notice sent on behalf of the first defendant, Exhibit A-39, there is no denial of the fact alleged namely that she was a Mahratta Kshatriya of the Bombay Presidency. Paragraph 6 of Exhibit A-38 reads as follows:

> "That my client and her caste people are not governed by the Mayukha law in this part of the country and therefore could not have taken any boy in adoption without the consent of the sapindas and did not so take as already stated supra."

It is implicit in this averment that the first defendant was a Mahrasta, Kshtriya of the Bombay Presidency though she took the liberty of saying that she was not governed by the Mayukha law. In the written statement filed in this suit, the first defendant for the first time denied that she was a Mahratta Kshatriya. This denial seems to be clearly by way of an after-thought being faced with a litigation which endangers her possession of valuable items of properties.

The first defendant wanted to make out by her oral testiomony that the ancestry of her deceased husband, Doss Rao, was not of pure Mahratta origin and that the stock from which he descended was not of cent per cent Mahratta blood. The first defendant's husband was no other than her own maternal uncle. Doss Rao's father and the first defendant's maternal grandfather was one Babu Rao. The first defendant deposed that Babu Rao's mother was a kalla lady called Ponni attached to the Thanjavur palace with whom Babu Rao's father developed illicit intimacy and that Babu Rao was the offspring of such intimacy. She also deposed that her maternal grandfather Babu Rao had married two wives one of whom Moi Bai was alleged to have belonged to the Mahratta group of people called "Akka Kuttam". The members of this Akka Kuttam group are stated to be attendants on the queens of the royal household who were drawn from different communities. She further deposed that her mother's mother Kanu Bai was not of good Mahratta stock but was of a mixed parentage. We are not prepared to accept the interested oral testimony of the first defendant in respect of ancestry of herself and her deceased husband as it is obvious that veracity is not her strong point. There is no independent evidence corroborating this evidence of the first defendant and we therefore hold that the lineage of the first defendant and her husband is in no way sullied so as to disentitle them to the claim of being Mahrattas.

The short point for decision is whether on the above facts it can be held that the parties are governed by the Bombay School of Hindu Law or not. Actual proof of migration especially in relation to families which had migrated centuries ago

will very often be impossible. But an inference of migration may be possible depending upon the facts and circumstances of each case. In *Babu Motising* v. *Durgabai*[1], the question was whether a particular sect of people who migrated from the Province of Oudh and settled in Khandesh were governed by the Benares School of Hindu Law. Dealing with the question of migration at page 245, Marten, C.J. observed as follows :—

"On the main point, I think, it is clear that to borrow the language used in *Soorendronath Roy* v. *Mussamut Heeramonee Burmoneah*[2], this community of Raghuvamshis migrated to Khandesh at some distant period of which no record is preserved. It must be atleast five or six generations ago. It may very well be at a much earlier date. On the evidence before us it is impossible to give an approximate date, except that it is long before living memory. The place from which they migrated was in all probability Oudh. Before us, it was not disputed that the law of the place from which they migrated was the Benares School of Law.

Now that being so, the ordinary presumption that the law to apply is the law of the Province in which the parties reside, is rebutted. The presumption next applicable is that this community on migration to Khandesh carried with them the law which had governed them up to migration, namely, the Benares school of law."

It must be noted that in this case there was no actual proof of migration.

However scanty the evidence of migration on the part of the ancestors of the parties may be it cannot be said that there is no evidence of such migration at all. The evidence of P.W. 4 on this question remained uncontradicted. His family name is Jadhav and he swears that his ancestors hailed from Poona. We see no reason to reject his testimony. We are of opinion that the evidence on record on this aspect of migration from the Bombay State of the ancestors of the parties is sufficient to establish that their ancestral home was the Bombay State, though it must be mentioned that that evidence is the irreducible minimum that is necessary to establish that fact.

It is also possible to draw an inference of migration from the fact that the parties have been persistently and invariably describing themselves as of the Mahratta stock. The first defendant made a bold attempt in the witness-box to say that she is neither a Mahratta nor a Tamilian. But it is very clear that she had not the courage to disown that she was a Mahratta. She admitted having described herself as a Mahrasta on every occasion and that her mother tongue was also the Mahratti language. Her venturesome attempt to show that she got herself assimilated with the local inhabitants of South India has proved a dismal failure.

In *Keshao Rao* v. *Sadasheorao*[3], the question raised was whether Mahrashtra Brahmins resident in the Central Provinces were governed by the Bombay School of Hindu Law even when migration was not proved in the sense that the exact origin of the family could not be traced. A Division Bench of the Nagpur High Court, consisting of Sir Gilbert Stone, C.J., and Vivian Bose, J., as he then was, held that the personal law must be applied in every case where it is known and it is only when it is not possible to ascertain that, the law of the domicil should be applied and then only in the last resort and even then only because it is assumed that it is the personal law. In that case the learned Judges considered the question as to the implication of the description of an individual as a Mahrashtra Brahmin. The place where the family in question was resident was Chaatisgarh which was not part of the Mahrashtra country. At page 472, Vivian Bose, J., observed as follows :

"It is clear that Chaatisgarh was never known as Maharashtra, and if it is equally beyond doubt that a race or tribe of people known as Maharashtrians never inhabited this area as a race or tribe, then it follows that any Maharashtrian who was found in these parts must have come as an immigrant, either he himself or his ancestors, and the fact that his family has retained its individuality intact as Maharashtrians must mean that they have not been absorbed into the particular strata of Hindu society prevalent and predominant in the locality. It must mean that they have carried with them their own law and their own usages from wherever it is that they came and preserved them as carefully as they have their own identity."

Again at page 476 the learned Judge observed as follows :

"Bearing this in mind, what is the significance of a family continuing to call itself Maharashtrian even though settled in a land which is not Maharashtra and among, what for these purposes may be

1. (1928) I.L.R. 53 Bom. 242.
2. (1868) 12 M.I.A. 81.
3. I.L.R. (1938) Nag. 469.

termed, an alien people ? What do we mean when we refer to a man in this connection as a Chinaman, or an Englishman or a Mahratta or a Bengali ? Surely this : that it indicates his racial origin, using the word racial in a loose and popular sense : that it shows either that his ancestors originated in the geographical area from which his racial or tribal name is derived, or that he belongs to a particular racial group or at any rate to a particular community. This is especially so among Maharashtrians who are not one whit behind the rest of India in their homogeneity and pride of race, in their love of their own great traditions and in what one might almost term their clannishness, using that term in its finer sense.

When therefore we find the great bulk of Maharashtrians governed by the law of the Mitakshara prevailing in Bombay, what does it indicate ? Surely this : that these people wherever they came from, whatever their origin, carried with them from place to place this particular law and that it has now become predominant in certain parts of Bombay only because they are the predominant people there."

Then again at page 477 :

"............wherever we find a family clinging to its individuality and retaining its identity as Maharastrian it must be presumed until the contrary is shown that it hailed from the race or group of people known as Maharashtrians and carried the law of Maharashtra with them ...."

We respectfully agree with this observation of the learned Judge and we wish to add that the observations quoted above precisely govern the decision of the issue of the proper law applicable to the parties here.

Maharashtrian Rulers of the Thanjavur Raj have been held to be governed by the Bombay School of Law. In *Maharajah of Kolhapur* v. *Sundaram Iyer*[1], it was held that the Rajahs of Thanjavur and their ancestors who had migrated from a place called Verole in the Bombay Presidency did not give up their personal law, that accordingly the adoption by Kamakshi Bayi Saiba even supposing that there was no express authority from her husband for adoption was valid in law. Several Maharashtra families from Poona, Bombay, and other parts of the Maharashtra territory should have migrated to Thanjavur either because of employment under the ruling Maharashtrian Princes or in the hope and expectations of favours from the Ruler. That accounts for a sizable Maharashtrian population in and around the district of Thanjavur.

In the light of the decisions referred to above and on the facts established we are clearly of opinion that the parties are governed by the Mayukha law of the Bombay State and that therefore the first defendant was competent to make a valid adoption without the consent of her deceased husband or without the consent of the kinsman of her deceased husband.

The first defendant claimed exclusive title in respect of items 1 and 2 of the plaint A Schedule properties. Items 27 to 29 and 35 and 49 of the plaint B Schedule properties and to the plaint C Schedule property. The items of properties in plaint A Schedule are houses situated in the municipal town of Thanjavur. The B Schedule items of properties are nanja and punja lands in the village of Panayur attached to Koilkannapur vattam. The plaint C Schedule properties is a house at Kivalur. The first defendant conveyed items 1 and 2 of the plaint A Schedule in favour of the second defendant for a sum of Rs. 6,000 under the registered sale deed Exhibit B-20 dated 1st June, 1952. Item 1 of the plaint A Schedule was purchased by the first defendant from a third party under the sale deed Exhibit B-22 dated 15th December, 1936. Under the terms of the ante-adoption agreement and the adoption deed, Exhibits A-2 and A-3, the first defendant became absolutely entitled to this property. Item 2 of the plaint A Schedule belonged to Doss Rao, he having purchased the same from a third party under Exhibit B-23 dated 24th February, 1923. The learned Subordinate Judge has rightly held that the first plaintiff had no right, in view of the terms of Exhibit A-2 and Exhibit A-3, to challenge the alienation by the first defendant of item 1. The first plaintiff has not challenged that finding by preferring any appeal or cross objection. The learned Subordinate Judge no doubt found that the first plaintiff will not be bound by the alienation of item 2 of the plaint A Schedule by the first defendant in favour of the second defendant.

1. (1924) I.L.R. 48 Mad. 1.

Appeal No. 168 of 1957 has been preferred by the alienee, the second defendant. The plaintiffs and the second defendant have filed a memorandum of compromise in regard to this item of property. That memorandum of compromise is recorded and there will be a decree in terms of the said compromise in A.S. No. 168 of 1957.

The first defendant acquired title in respect of items 27, 27-A, 29 and 35 under Exhibit B-31 dated 12th September, 1942 from one Gnanasiva Kandiar and the members of his family. She purchased these items of properties for a total consideration of Rs. 4,500. The Court below has proceeded upon the footing that items 28 and 49 of the plaint B Schedule are also comprised in this sale deed. We have compared the schedule of properties attached to the plaint with the schedule of properties in Exhibit B-31. Exhibit B-31 does not comprise the two items, 28 and 49 of the plaint B Schedule. The first defendant has not produced any sale deed in regard to these items. The first defendant has alienated items 29 and 35 of the plaint B Schedule in favour of the third defendant under Exhibit B-21 dated 12th December, 1953. The learned Subordinate Judge has held that these items of properties in the plaint B Schedule really constitute accretions to the estate of the late Doss Rao and that therefore the first defendant was not competent to alienate them.

The question for consideration is whether the properties purchased by the first defendant under Exhibit B-31 really belonged to her or to the estate of her deceased husband. Under the terms of Exhibits A-2 and A-3 the first defendant was entitled to all the properties purchased by her after the death of her husband on 3rd September, 1934 and before the date of the adoption 8th June, 1938. Her evidence is that in 1935 she purchased a house at Ganapathinagar, Thanjavur. She deposed that she had jewels weighing 100 sovereigns worth about Rs. 2,500 and that she had diamond ear-ring, diamond nose-screw, addigai with rubis and mangamalai with red stones and diamond rings. According to her she purchased the house at Ganapathinagar for Rs. 3,000 in 1935 and purchased another house in New Street in 1936 for Rs. 2,000. She claimed to have purchased these properties by selling jewels weighing 100 sovereigns for Rs. 2,500 and by selling the other jewels (stoned jewels) for Rs. 3,000. The purchase of the house in New Street in 1936 is evidenced by Exhibit B-22 dated 15th December, 1956 and the property comprised therein is item 1 of the plaint A Schedule. There is no sale deed in regard to the property set out in the plaint C Schedule, the Kivalur house. The sale deed in her favour for the purchase of the Ganapathinagar house also is not made available. The purchases made by her of the lands in Panayur village under Exhibit B-31 was for a sum of Rs. 4,500. There is no reason to disbelieve the evidence of the first defendant that she had some costly jewels which she disposed of after the death of her husband. She was the wife of a Tahsildar, and it is very likely that her husband made for her jewels of the value mentioned by her. The onus of establishing that the purchase standing in the name of the first defendant was made by her not out of her own separate funds but from the income of her husband's property is undoubtedly upon the first plaintiff. The first defendant purchased a house at Ganapathinagar for Rs. 3,000 in 1935 soon after the death of her husband and sold it in 1942 and purchased the properties under Exhibit B-31. She could not have got Rs. 3,000 from the income of her husband's properties within a year after his death. The plaintiffs have failed to prove that the properties comprised in Exhibit B-31 form accretions to the estate of Doss Rao.

We are of opinion that the first defendant got the properties under Exhibit B-31 and the Kivalur house only from and out of her own separate funds. The suit in respect of items 27, 27-A of the plaint B Schedule and the plaint C Schedule must therefore fail. We are unable to give any relief to the first defendant regarding items 29 and 35 of the plaint B Schedule as these two items are excluded from the subject-matter of the appeal by endorsement in the memorandum of appeal. There is also no appeal by the third defendant, the alienee in respect of these two items.

The learned Subordinate Judge has granted a decree in favour of the plaintiff directing the first defendant to render accounts from 8th June, 1938, the date of

adoption, till delivery of possession of the immoveable properties decreed in his favour. The basis of the liability of the first defendant to render accounts to the first plaintiff is stated to be her fiduciary position as guardian of the first plaintiff during his minority which she specially undertook under the terms of Exhibits A-2 and A-3. The first defendant of course did not purport to act as the guardian of the minor first plaintiff but dealt with the properties as if they belonged to her absolutely and exclusively. The first defendant has failed to challenge the correctness of this portion of the decree of the Court below in the memorandum of grounds of appeal. It is stated in the endorsement on the memorandum of appeal that clause 2 of the decree of the Court below relating to rendition of accounts is not disputed by the appellants. Learned counsel appearing for the first defendant also did not adduce any arguments to show that the first defendant should not be made liable to render accounts from 1938 onwards. We have necessarily therefore to confirm this part of the decree of the Court below though we are by no means sure that the legal position is such as to enable the first plaintiff to obtain this relief.

Learned counsel for the first defendant contended that even if the first plaintiff were to succeed in establishing his status as the adopted son of Doss Rao he will not be entitled to recover possession of the plaint properties as she succeeded to the properties absolutely under the Mayukha Law as the widow of Doss Rao after his death. It was further contended that the terms of Exhibits A-2 and A-3 cannot divest the first defendant of the estate which she came to inherit, as the adopted son under the Hindu Law can only get the estate of his deceased adoptive father divesting any limited estate which his adoptive mother might have inherited, as the widow of the deceased adoptive father. This contention is obviously erroneous and unsustainable. Even according to the Bombay school the female heirs inheriting from a male fall into two classes, namely, (*a*) those who are introduced into the gothra or family of the deceased owner by marriage such as the deceased's wife, mother, father's mother, *etc.*, and (*b*) other female heirs being females born in the family such as the daughter, sister, brother's daughter, sister's daughter, *etc.* Property inherited by a female belonging to class (*a*) does not become her stridhana. She takes only a limited interest in such property and on her death it passes to the next heir of the male from whom she inherited it. (*Mulla on Hindu Law* 12*th edition, pages* 209-210). The first defendant therefore got only the limited interests of a Hindu widow by succeeding to the properties of her late husband Doss Rao. But it was contended on behalf of the first defendant that she was only the sister's daughter of Doss Rao and therefore she must be deemed to belong to class (*b*) referred to above and that she therefore took an absolute estate. This argument is wholly fallacious. The first defendant did not succeed to the properties of Doss Rao as the properties of her maternal uncle but only as his widow. We are of opinion that the first plaintiff is not in any way disentitled to recover possession of the plaint properties except in regard to such of those items in respect of which he cannot lay claim by reason of the terms of Exhibits A-2 and A-3.

It was next contended on behalf of the first defendant that she will be entitled to a share in the suit properties under the provisions of the Hindu Women's Right to Property Act. This enactment is not retrospective in operation and does not apply to the property of any Hindu who died intestate before the commencement of the Act. The Act came into force on and from 14th April, 1937. The husband of the first defendant died on 3rd September, 1934. The first defendant cannot therefore put forward any rights under the Act. But it is said that the first defendant's husband did not die intestate as he left behind his last will and testament dated 31st August, 1934. Neither the original of the will nor an authenticated copy of the original has been made available to the Court. The first defendant charges the first plaintiff's father with having taken away the will and suppressed it. D.W.6, one Rajagopala Pillai, has been examined as a witness on the side of the first defendant to prove that Doss Rao left a will. According to this witness he met Doss Rao at his residence at Thanjavur two or three days before his death, that when he went there a will was being written by one T. A. Krishnaswami Rao to the dictation of Doss Rao, that Doss Rao signed the will that the witness attested, and that the scribe

Krishnaswami Rao also attested it. The witness added that both the wives of Doss Rao, namely, defendants 1 and 6 were present at the time of the alleged execution of the will. This witness further deposed that under the said will all the properties of Doss Rao were bequeathed to the first defendant, and that the testator also gave some properties for some charitable purpose. The sixth defendant was to have half the properties if she could not live amicably with the first defendant. The first defendant also spoke to the execution of the will in the manner deposed to by D.W. 6. The sixth defendant deposed in the chief examination as follows :

> " 4 days before death he wanted to write a will. 2 days before death they were writing something. I was present. Rajagopal and Srinivasa Rao were present. The document then was written and handed over by Doss Rao to D-1. He said that he had bequeathed properties to me."

In cross-examination she deposed as follows :

> " I did not see whether the document written two days before Doss Rao's death was in English or Tamil. I had confidence in D-1 when my husband gave her his will."

Another witness who spoke to the execution of the will is D.W. 1, the fifth defendant in the suit, who was alleged to have been brought up by Doss Rao as his foster son. Doss Rao admittedly survived for three days after the execution of the alleged will. If he had written any will he would certainly have had it registered. There is no explanation on the part of the defendants why Doss Rao refrained from registering the will if at all he executed any such instrument. The evidence in support of the alleged will is meagre and unsatisfactory and is wholly insufficient to establish the alleged will, set up by the first defendant. As there is no proof before Court of Doss Rao having left behind a valid testament he must be deemed to have died intestate. The first defendant is clearly not entitled to claim any right under the Hindu Women's Right to Property Act.

The sixth defendant has preferred appeal, A.S. No. 278 of 1957 challenging the correctness of the finding of the learned Subordinate Judge holding that she was not the lawfully wedded wife of Doss Rao. It is really unnecessary to decide the status of the sixth defendant in this litigation. The first plaintiff having established his status as the validly adopted son of Doss Rao he is entitled to the reliefs prayed for by him in the plaint to the extent to which his claim is upheld by this Court. This relief he will be entitled to even if it were to be held that the sixth defendant was the junior wife of Doss Rao. Learned counsel appearing for the sixth defendant submitted that he did not wish to press the appeal if the status of his client is left open and the finding of the learned Subordinate Judge holding her not to be the wife is vacated. Learned counsel appearing for the plaintiffs had no objection to this question being left open as the plaintiffs are in no way affected in this suit by the real status of the sixth defendant. The finding of the learned Subordinate Judge holding that the sixth defendant was not the lawfully wedded wife of Doss Rao is set aside and the question of her status is left open.

In the result there will be a decree in terms of the memorandum of compromise in A.S. No. 168 of 1957 and the appeals A.S. Nos. 61 and 278 of 1957 are dismissed, subject to the modification of the decree of the Court below in regard to few items of the plaint mentioned properties. The parties will bear their respective costs in this Court in all the appeals.

C.M.P. No. 1675 *of* 1957 :—Dismissed with costs.

V.S. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATADRI.

The Madurai Municipality, having its office at Madurai, through its Executive Authority, the Commissioner, having its office at the Palace Road, Madurai .. *Appellant**

v.

The State of Madras represented by the Collector of Madurai holding office at Tallakulam, Madurai and another .. *Respondents.*

Madras District Municipalities Act (V of 1920), section 76-A (d)—Local Authorities Electrical Engineers' Service—Engineer transferred from Madurai Municipality to Tanjore Municipality—Suspension pending criminal complaint—Grant of subsistence allowance from the Central Fund maintained by Chief Electrical Inspector to the State Government—Reinstatement with full pay for period of suspension after acquittal by the Court—G.O. directing the Madurai Municipality to refund the subsistence allowance and to pay the salary, etc., of the Officer for period of suspension—Validity of—Suit by the Madurai Municipality to recover the amounts paid under protest.

Long after this the Government made a new Regulation in 1953 purporting to act under section 76-A (*d*) of the Madras District Municipalities Act to the effect that in similar circumstances the amounts can be recovered from the Municipal Councils concerned. It was notified that this regulation shall be deemed to have come into force on 1st April, 1951.

Held, section 76-A (*d*) of the District Municipalities Act is wide enough to cover the Regulation of 1953 providing for the salary in a contingency such as has happened in the instant case. If the Government has the power to regulate the pay and allowances of a Municipal Engineer, such power should include the power to provide for payment when an officer is suspended for a time and thereafter reinstated and the period of suspension is treated as if the officer was on duty. It was certainly open to the Government to give retrospective effect to the Regulation made in 1953.

The Regulation of 1953 no doubt provides for the recovery from the Municipal Councils concerned of the pay and allowances, etc. of an officer who has been dismissed, removed or suspended and is subsequently reinstated and the period of absence is treated as leave or as on duty as the case may be. But the officer in the instant case was not serving any municipality during the period of his suspension. It is only notionally that he was treated as if he was on duty. If the officer was suspended while he was in service under a particular municipality and he was reinstated notionally he may be deemed to have been in service in that municipality which he was serving on the date of suspension. The Madurai Municipality was not the Municipality which the officer was serving when he was suspended to make it the Municipal Council concerned. The fact that the prosecution was in respect of the acts done by the officer while he was serving the Madurai Municipality would not make it the Municipality concerned within the meaning of the resolution.

The order of the Government dated 3rd October, 1951 was not valid not only on the date on which it was passed but even after the making of the Regulation of 1953 with retrospective effect.

The Madurai Municipality was held entitled to recover the amounts only from the State Government, since the officer was entitled to these amounts under rule 54 of the Fundamental Rules.

Appeal against the decree of the Court of the Subordinate Judge of Madurai in Original Suit No. 75 of 1955.

M. K. Nambiar, for Appellant.

The Government Pleader (*A. Alagirisami*), for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal from the Judgment and Decree of the learned Subordinate Judge of Madurai in O.S. No. 75 of 1955 on his file. The suit was filed by the Madurai Municipality through its Executive Authority, the Commissioner, for the recovery of a sum of Rs. 20,966-15-9 from either or both of the two defendants, namely, the State of Madras, represented by the Collector of Madurai, and T.S. Jayarama Ayyar. The facts, regarding which there is no dispute, are the following. The second defendant, Jayarama Ayyar, was a member of the Madras Local Authorities Electrical Engineers' Service. His appointment and conditions of service are regulated by the rules relating to the said service. The second defendant was posted as the Electrical Engineer of the plaintiff-Municipality by an order of the Government and he took charge of his office on 19th February, 1946. While

* Appeal No. 73 of 1957. 16th December, 1960.
(25th Agrahayana, 1882, Saka).

the second defendant was in the employment of the plaintiff-Municipality, there were several complaints against him, charging him with corruption and other acts of misconduct. These complaints were brought to the notice of the Government by the Municipal authorities. On 22nd October, 1948, the Chairman of the Madurai Municipal Council addressed a letter to the Minister for Local Administration, enclosing a report of the Commissioner of the Municipality relating to the misconduct of the second defendant for necessary action. On 29th October, 1948, the Chairman, in continuation of his letter of 22nd October, forwarded to the Minister for Local Administration a copy of the latest demi-official letter sent by the Commissioner to the Chief Electrical Inspector to the Government with enclosures. The Chairman added :

> " I feel that the Electrical Engineer should be removed from the scene of his operations before a regular enquiry begins."

The second defendant was accordingly transferred on 15th November, 1948 to the Tanjore Municipality to facilitate investigation into the complaints against him. The several charges made against the second defendant were investigated by the Criminal Investigation Department of the Government of Madras, and the Superintendent of Police of X-Branch addressed a letter to the Chief Secretary to the Government of Madras, requesting that necessary sanction to prosecute the second defendant might be accorded. On 22nd April, 1949, the Government passed the following Order (G.O. Ms. No. 857, Local Administration) :

> " Whereas information has been received that Sri T. S. Jayarama Ayyar, Municipal Electrical Engineer, Tanjore, while working as Municipal Electrical Engineer, Madurai, between the dates 18th February, 1946, and 6th November, 1948, accepted illegal gratification from certain individuals, to wit, Sri Narasimhalu Naidu, Sri J. R. Ramachari and Sri Pandian Chettiar of Maduari, as a reward for giving electrical service connections to the said individuals and thereby committed offence punishable under section 161, Indian Penal Code and section 5 (2) of the Prevention of Corruption Act, 1947 (Central Act II of 1947) read with section 5 (1) (*d*) thereof :
>
> Now, therefore, in exercise of the powers conferred by section 197 (1) of the Code of Criminal Procedure, 1898 (Central Act V of 1898) and section 6 (*b*) of the Prevention of Corruption Act, 1947 (Central Act II of 1947), His Excellency the Governor of Madras hereby sanctions the prosecution of the said Sri T. S. Jayarama Ayyar, in respect of the said offence."

On 19th May, 1949, the Government passed another order, placing the second defendant under suspension with effect from 11th May, 1949 afternoon till the criminal complaint filed against him by the Criminal Investigation Department before the Sub-Magistrate, Madurai, was disposed of. By a subsequent G.O., dated 15th July, 1949, the Government directed that the second defendant be granted during the period of suspension a subsistence grant of Rs. 258-14-0 per mensem and a dearness allowance of Rs. 51 per mensem and the Chief Electrical Inspector to Government was requested to pay him the said subsistence grant and dearness allowance with effect from 12th May, 1949 forenoon. The Chief Electrical Inspector to Government was also requested to suggest suitable amendments to the regulations governing the Madras Local Authorities Electrical Engineers' Service, so as to provide for the payment of subsistence grant and dearness allowance from the Central Fund in cases like this. The prosecution launched against the second defendant ended in a conviction by the Sessions Judge, Madurai. But, on appeal to this Court, he was acquitted on 29th November, 1950. Consequent on his acquittal, the second defendant was reinstated to the Madras Local Authorities Electrical Engineers' Service with effect from 26th April, 1951 forenoon. Thereafter, on 3rd October, 1951, the Government passed the order, the validity of which is the subject-matter of this appeal. The order (Exhibit A-2), in so far as it is material for this appeal, runs thus :

> " As the Engineer has been honourably acquitted of the charges, the period of his absence from 11th May, 1949 afternoon to 26th April, 1951 forenoon is treated as duty under Fundamental Rule 54. The Commissioner, Madurai Municipality, is therefore directed :
>
> (i) to pay the entire salary of the Engineer from 12th May, 1949 to 25th April, 1951 (both days inclusive), inclusive of increments after deducting the subsistence allowance already drawn by him ;
>
> (ii) to refund to the Central Fund maintained by the Chief Electrical Inspector to Government the subsistence grant paid from it ; and

(iii) to debit the expenditure to the funds of the Electric Licence Scheme of the Muncipality.

" The Engineer is eligible to subscribe to the Provident Fund for the period of suspension and the Provident Fund bonus due thereon should be paid by the Madurai Municipality."

Though the second defendant was thus reinstated, disciplinary proceedings were taken against him ; and, after enquiry, on the recommendation of the Tribunal for Disciplinary Proceedings, the Government, by its order dated 13th April, 1954 directed that the second defendant be compulsorily retired from service. Long after the Government Order dated 3rd October, 1951 referred to above, the Government published, by notification in the Gazette, a new regulation, purporting to have been made in exercise of the powers conferred by section 76-A (*d*) of the Madras District Municipalities Act, 1920. The regulation is as follows :—

" When a municipal engineer, municipal electrical engineer or assistant electrical engineer or municipal health officer who has been dismissed, removed or suspended is reinstated and the period of absence is treated as leave or as duty, as the case may be, the pay and allowances and the contributions towards leave salary and pension or provident fund of the officer concerned shall be recovered either in whole or in part thereof from such of the municipal council or municipal councils concerned as the Government may determine."

It was further notified that this regulation shall be deemed to have come into force on 1st April, 1951. Before this regulation was made, the plaintiff-Municipality had paid the amounts directed by the Government Order dated 3rd October, 1951 under protest. On 16th April, 1955, the plaintiff-Municipality filed the suit for the recovery of the amount paid by them with interest thereon.

Several grounds were taken in the plaint in support of the plaintiff's case that the plaintiff-Municipality would not be liable to pay the amounts in question. The State of Madras denied the tenability of these grounds. The second defendant filed a separate written statement. It is not necessary to set out at length the various allegations in the plaint and the pleas contained in the two written statements, as the arguments in appeal before us were confined within a narrow range.

The learned Subordinate Judge found on the material issues against the plaintiff-Municipality and dismissed the suit with costs. Hence, this appeal by the Municipality.

Before we deal with the contentions raised on behalf of the parties, it is necessary to set out the relevant statutory provision, namely, section 76-A, of the Madras District Municipalities Act, as amended by the Third Amendment Act, 1933. That section runs as follows :—

" Notwithstanding anything contained in this Act—

(*a*) the State Government may, by notification, take power to appoint the health officer, (the municipal engineer, the municipal electrical engineer or the assistant municipal electrical engineer) in the case of any municipality or class of municipalities ;

(*b*) the State Government may recover from the municipal council concerned the whole or such proportion of the salary and allowances paid to any such health officer, (engineer, electrical engineer or assistant electrical engineer) and such contribution towards his leave allowances, pension and provident fund as the State Government may, by general or special order, determine ;

(*c*) the State Government may, at any time, withdraw any such health officer, (engineer, electrical engineer or assistant electrical engineer) and appoint another in his place ; and

(*d*) the State Government shall have power to regulate the methods of recruitment, conditions of service, pay and allowances and discipline and conduct of the health officers, (engineers, electrical engineers and assistant electrical engineers) appointed under clause (*a*) ".

The main question which falls for decision in this appeal is : Did the Government have power and authority to pass the order dated 3rd October, 1951 (Exhibit A-2) directing the Municipality to pay the entire salary of the second defendant from the date of suspension till the date of reinstatement and other amounts mentioned therein ? The learned Government Pleader, if we understood him aright, relied on the regulation (Exhibit B-1) made subsequently in 1953, as conferring such power. Though the regulation was actually notified in 1953, as we mentioned above, it was expressly given retrospective effect on and from 1st April, 1951.

Mr. M. K. Nambiar, learned counsel for the appellant-Municipality, contended that there was no statutory authority which enabled the Government to pass the

order dated 3rd October, 1951, and even if retrospective effect is given to the later regulation, that would not cure the earlier G.O. of its defects. He further contended that the regulation, which purported to have been made in exercise of the powers conferred on the Government by section 76-A (*d*), could not fall within the scope of that provision. He also contended that, in any event, the appellant-Municipality could not be deemed to be the Municipality " concerned " within the meaning of that expression occurring in the Regulation of 1953.

The second defendant was a member of the special category of service called the Madras Local Authorities Electrical Engineers' Service. The members of this Service are not *per se* Government servants, though it is open to the Government to appoint an officer in Government service to hold a post borne on the cadre of this special service. Regulations have been made by the State Government, presumably under the powers vested in them, under section 76-A (*d*) of the District Municipalities Act, providing for the methods of recruitment, conditions of service, pay and allowances, and discipline and conduct of the officers belonging to this service. The appointments are made by the Government. Postings and transfers are made by the Government, generally on the recommendation of the Chief Electrical Inspector. Under Regulation 21, the transit pay, and travelling allowance, when a member of the service is transferred from one Municipality to another Municipality shall be regulated by the Madras Travelling Allowance Rules. That regulation further provides that the transit pay and travelling allowance of the member shall be paid from the funds of the Municipality or Local Board to which he is posted, and, in cases of reversion to his permanent post, by the Municipality or Local Board, of which he is the permanent servant. Regulation 24 deals with leave and leave salary, and it runs thus :—

" (1) The leave and leave salary of the members of the Service shall be regulated—

(i) by the Fundamental Rules if, at the time of their appointment, being in Government, municipal or local board service, they were or shall be governed by the Fundamental Rules and had not elected or shall not have elected to be governed by the Madras Leave Rules, 1933 ; and

(ii) in all other cases by the Madras Leave Rules, 1933.

(2) The Government may grant leave to the members of the service under the Fundamental Rules or the Madras Leave Rules, 1933, as the case may be.

(3) (*a*) There shall be a Central Fund to provide for the payment of leave salary and contribution to Provident Fund during leave of the members of the Service. The Fund shall be administered by the Chief Electrical Inspector to Government.

(*b*) Every municipal council or local board to whose service a member of the Service is posted shall pay to the Central Fund every month—

(i) a contribution towards his leave salary at the rate of 12½% of his pay if he is governed by the Fundamental Rules or at 11% of his pay if he is governed by the Madras Leave Rules, 1933 ; and

(ii) a contribution calculated at 3⅛per cent. of the contribution towards the leave salary in order to provide for the payment of contribution to this Provident Fund during leave."

Regulation 25 is concerned with disciplinary proceedings. Sub-clause (*e*) of that Regulation provides for a member of the service being placed under suspension from service pending enquiry into grave charges where such suspension is necessary in the public interest ; and, during the period of suspension, he shall be paid subsistence grant and dearness allowance from the Central Fund. Regulation 26 runs thus :

" Except to the extent expressly provided in these regulations, the Fundamental Rules issued from time to time under the authority of the Government shall apply to the members of the service."

When a member of the Madras Local Authorities Electrical Engineers' Service is appointed by the State Government as the Municipal Electrical Engineer of a Municipality, under section 76-A (*b*) the State Government may recover from the municipal council concerned the whole or such proportion of the salary and allowances paid to such Electrical Engineer and such contribution towards his leave allowances, pension and provident fund as the State Government may, by general or special order, determine. It is this provision which is embodied in Regulation 15 of the regulations referred to above, which *inter alia*, says that the pay of a member of

the service shall be met by the municipality or local board in which he is employed. The expression " municipal council concerned ", which occurs in clause (*b*) of section 76-A, is practically the same as the expression " the municipality in which he is employed", which occurs in Regulation 15. The second defendant was admittedly employed in the plaintiff-Municipality as Electrical Engineer from 19th February, 1946 till 15th November, 1948. It follows, therefore, that from 15th November, 1948 the plaintiff-Municipality will not be the municipal council concerned, from which the salary and allowances payable to the second defendant can be recovered under section 76-A (*b*) of the Act. Once the second defendant left the service of the plaintiff-Municipality, it was no longer under any obligation to pay the salary of the second defendant under Regulation 15. The Government placed the second defendant under suspension from 11th May, 1949. This was when the second defendant was the Electrical Engineer employed in the Tanjore Municipality. Earlier on in this judgment, we have mentioned the events subsequent to his suspension, namely the prosecution of the second defendant and his final acquittal by this Court on 29th November, 1950. During this period, he was not employed in any municipality ; indeed, he could not even be deemed to be a member of the service. Consequent on his acquittal, the second defendant was reinstated to the service with effect from 26th April, 1951. Fundamental Rule 54 at the material time was in the following terms:

" 54. (1) When a Government servant who has been dismissed, removed or suspended is reinstated, the authority competent to order the reinstatement shall consider and make a specific order—

(*a*) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty ; and

(*b*) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority mentioned in clause (1) is of opinion that the Government servant has been fully exonerated , or, in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or suspended, as the case may be.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe :

Provided that the payment of allowances under clause (2) or clause (3) shall be subject to all other conditions under which such allowances are admissible.

(4) In a case falling under clause (2), the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under clause (3), the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose."

There can be no doubt whatever that the second defendant was entitled to the benefit of the provisions of this rule. It was further open to the Government to treat the period of his absence from 11th May, 1949 afternoon to 26th April, 1951 forenoon as on duty. The question then arises,—which is the question to be decided in this appeal—as to who is liable to pay the second defendant his salary for the aforesaid period. Admittedly, there was nothing in the regulations relating to the concerned service, which provided for this contingency. Obviously, section 76-A (*b*) of the District Municipalities Act would not cover the case, because that clause must be read with clause (*a*). When the State Government appoints a Municipal Electrical Engineer for a municipality, that municipality will be liable to pay the salary and allowances payable to such officer. Actually, during the period from 11th May, 1949 to 26th April, 1951, the second defendant was not in service anywhere. Under rule 54 of the Fundamental Rules, it is open to the Government to subsequently treat this period as a period when the second defendant was on duty. But then there is no indication anywhere as to the municipality in which he is supposed to be on duty during that period. When he was suspended, the second defendant was the Municipal Electrical Engineer of the Tanjore Municipality. He was not in the service of the plaintiff-Municipality. If retrospectively the second defendant should be deemed to be in service during the period, logically, he must be deemed to be in the service only of the Tanjore Municipality, though actually that Municipality did not have the benefit of his service. The learned Government Pleader had to concede this position. He therefore rested his

whole case on the new regulation made in April, 1953 (Exhibit B-1), which we have quoted above. Though the regulation was made in 1953, it was expressly declared that it shall be deemed to have come into force on 1st April, 1951. Though Mr. Nambiar, during the course of the arguments, raised a contention that, if the original order of the Government in 1951 directing the plaintiff-Municipality to pay the salary of the second defendant is void on the date when it was passed, the subsequent regulation could not give it validity by reason of its retrospective operation, he did not press it,— and we think, rightly. It was certainly open to the Government to give retrospective effect to the regulation made in 1953.

Mr. Nambiar's contentions regarding this regulation were (1) that the Government had no power to make such a regulation under section 76-A (*d*) of the District Municipalities Act, and (2) that in any event, the plaintiff-Municipality will not be the municipality concerned within the meaning of the regulation. We are not inclined to agree with the first contention of Mr. Nambiar. In our opinion, section 76-A (*d*) is wide enough to cover the regulation providing for the payment of salary in a contingency such as has happened in this case. We have already noticed how the regulations contained a provision for transit pay and allowances. If the Government has the power to regulate the pay and allowances of a Municipal Electrical Engineer, such power should include the power to provide for payment when an officer is suspended for a time and thereafter reinstated and the period of suspension is treated as if the officer was on duty during that period.

But we think there is substance in Mr. Nambiar's second contention. The Regulation of 1953 (Exhibit B-1), no doubt, provides for the recovery of the pay and allowances and contribution towards leave salary and pension or provident fund of an officer who has been dismissed, removed or suspended and is subsequently reinstated and the period of absence is treated as leave or as on duty, as the case may be. All that the regulation says is that it

" shall be recovered either in whole or in part from such of the municipal council or municipal councils concerned as the Government may determine."

The learned Government Pleader strongly relied on this provision. His contention was that it was entirely for the Government to determine which municipal council should bear the burden. To a certain extent, this is correct. But the municipal council or councils should be " concerned." It would not be open to the Government, for instance, in this case, to direct that the pay and allowances of the second defendant should be recovered from the Chingleput Municipality. In fact, he was not serving any municipality during the period he was under suspension. It is only notionally that he is treated as if he was on duty. Logically, as we once before pointed out, if an officer is suspended when he was in a service under a particular municipality and he is reinstated, notionally he may be deemed to have been in service in that Municipality which he was serving on the date of suspension. In the present case, the plaintiff-Municipality was not the Municipality which the second defendant was serving when he was suspended. The learned Government Pleader urged that it was at the instance of the plaintiff-Municipality that the second defendant was prosecuted criminally and that therefore it should be regarded as the concerned Municipality. It is true that the second defendant was charged with offences alleged to have been committed by him when he was an officer of the plaintiff-Municipality. But it would not be correct to say that the prosecution was at the instance of the plaintiff-Municipality. All that the plaintiff did was to bring to the notice of the Government the complaints against the second defendant. Tne Chief Electrical Inspector to the Government examined the allegations and sent up a report. That report and all relevant records were forwarded to the Superintendent, X-Branch, C.I.D., Madras, for further investigation. The Superintendent, X-Branch, recommended a prosecution and sought the sanction of the Government for such prosecution. It was the Government which sanctioned the prosecution and conducted it. In our opinion, the fact that the prosecution was in respect of acts done by the second defendant while he was serving the plaintiff-Municipality, would not make it the Municipality concerned within the meaning of the Regulation. That

the plaintiff-Municipality acted in public interests in bringing to the notice of the Government the misdeeds of the second defendant is manifest from subsequent events. The Government, after the acquittal of the second defendant by the High Court, commenced disciplinary proceedings against him, and, eventually, passed an order, compelling him to retire. We therefore hold that the order of the Government, Exhibit A-2, dated 3rd October, 1951, was not valid not only on the date on which it was passed, but even after the making of the Regulation of 1953 with retrospective effect. The suit as framed was for the recovery of the amount which the plaintiff-Municipality was compelled to pay, from both the defendants or either of them. So far as the second defendant is concerned, he was entitled to be paid under rule 54 of the Fundamental Rules, and it is not equitable that he should be directed to pay back the amount received by him. As the Municipality was compelled to make the payment by the Government and the loss was sustained by the Municipality on account of the invalid action of the Government, the plaintiff will be entitled to a decree against the State of Madras, the first defendant, for the recovery of the amounts paid by them under protest; but the plaintiff-Municipality will not be entitled to any interest on the amounts except from the date of the decree. The appeal is allowed to this extent, and there will be a decree in favour of the appellant in accordance with this judgment. The appeal will stand dismissed as against the second respondent. There will be no order as to costs in this appeal.

Time for payment: Three months.

In a matter like this, we cannot refrain from observing that the best provision for a contingency like that which has happened in this case would be a regulation providing for the payment of the salary, *etc.*, of the reinstated officer from the Central Fund. There is already a provision for the payment of leave salary from the Central Fund and also for the payment of subsistence grant and dearness allowance during the period of suspension from the same Fund. We think that it is just and equitable that the payment of salary, *etc.*, under rule 54 should also be paid from the same fund. This is only a suggestion which we are making for examination by the Government.

V.S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATADRI.

Mohammad Hussain and another .. *Appellants**

v.

Ganga Naicken *alias* Gangama Naicken and others .. *Respondents.*

Limitation Act (IX of 1908), Article 182—Decree for possession and mesne profits—Mesne profits to be determined under Order 20, rule 12, Civil Procedure Code—Partly final and partly preliminary—Execution of the decree for possession—Limitation—Starting point.

A suit for possession of immovable property and mesne profits is a suit comprising of two claims and where a decree is made for possession it is final as to that part though the part relating to mesne profits may be preliminary pending final determination of the quantum under Order 20, rule 12, Civil Procedure Code. Although one decree is made it is partly preliminary and partly final and the final part can be executed. Time for execution of such a decree for possession will run from the date of the decree under Article 182 (1) of the Limitation Act; and in the instant case the application for execution filed beyond three years from the date of dismissal of prior petition (*i.e.*,) 24th February, 1947 is barred under Article 182 (5).

Appeal under clause 15 of the Letters Patent against the Judgment and Order of the Hon'ble Mr. Justice Ramaswami, dated 9th December, 1957 and passed in A.A.A.O. No. 102 of 1957 preferred against the order of District Court, Tiruchirappalli, dated 19th August, 1957 and made in A.S. No. 354 of 1956 preferred against the order of the Court of the Subordinate Judge of Tiruchirappalli, dated 20th April, 1956 and made in E.P. No. 64 of 1955 in O.S. No. 128 of 1945.

T. M. Krishnaswami Ayyar, P. Sharfuddin, V. Venkatesan, and *C. F. Louis* for Appellants.

M. Ranganatha Sastri, for Respondent.

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* L.P.A. No. 7 of 1958. 9th January, 1961. (19th Pausa, 1882, Saka).

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal under the Letters Patent from the judgment of Ramaswami, J., in C.M.S.A. No. 102 of 1957 with his leave. It arises in the execution of the decree passed in O.S. No. 128 of 1945 on the file of the Subordinate Judge of Tiruchirappalli on 16th March, 1946. The material part of this decree runs as follows :—

"This Court doth order and decree that the defendants do put the plaintiff in possession of the property mentioned in the schedule hereunder and do pay the plaintiff Rs. 135 for past mesne profits. This Court doth further order and decree.

(1) That the claim for the balance of past mesne profits be dismissed without costs.

(2) That the mesne profits from date of plaint be determined by a separate petition under Order 20, rule 12, Civil Procedure Code.

(3) That the defendants do pay the plaintiff the sum of Rs. 42-6-0 being his proportionate cost in the suit and do bear their own costs Rs. 26-0-0."

E.P. No. 278 of 1946 was filed by the decree-holder for delivery of possession in pursuance of this decree. His petition was dismissed on 24th February, 1947 for non-payment of batta. On 16th March, 1949 an application was filed under Order 20, rule 12, Civil Procedure Code by the plaintiff, I.A. No. 476 of 1949 for ascertaining mesne profits and payment of the same. That petition was first dismissed, but eventually the learned District Judge of Tiruchirappalli passed a decree on 10th March, 1953 for Rs. 1,310-1-0 as future mesne profits. On 13th November, 1954, the original decree-holder's legal representatives, the present appellants before us, filed E.P. No. 64 of 1955 for delivery of possession and for attachment and sale of movables of the defendants in execution of the decree. The reliefs sought in this execution petition were realisation of the amount due for mesne profits and subsequent costs by attachment and sale of the movables of the defendants and for delivery of properties decreed in favour of the second plaintiff (first petitioner) on behalf o both the petitioners. Subsequently the execution petition was confined to the relief of possession. The learned Subordinate Judge of Tiruchirappalli dismissed the execution petition as barred by time and his decision was confirmed by the learned District Judge of Tiruchirappalli on appeal. Then followed the Civil Miscellaneous Second Appeal (102 of 1957) filed by the decree-holder's legal representatives, which was also dismissed by Ramaswami, J. Hence this appeal.

Mr. T. M. Krishnaswami Ayyar, learned counsel for the appellants, contended that there could only be one decree in a suit and in this case that decree in its complete form must be deemed to have been passed only on 10th March, 1953, when the learned District Judge passed a decree for mesne profits. That would be the date from which time would run, and as the present E.P. was filed in 1954 it was well within time. Though there was a prior execution petition filed to execute the decree for possession and that was dismissed in 1947, the decree-holders could file a new execution petition without any reference to the previous petition for the execution of the complete decree, which must be deemed to have been passed in 1953. Though he cited to us several decisions of this Court, *viz.*, *Vydianatha Aiyar* v. *Subramanian Pattar*[1], *Kanniammal* v. *Balakrishna*[2], *Lakshminarasimham* v. *Suryanarayana*[3], *Basavayya* v. *Guravayya*[4], and *Sivaramachari* v. *Anjaneya Chetty*[5], the only decision which requires our consideration is the decision in *Vydianatha Aiyar* v. *Subramanian Pattar*[1]. In none of the other cases did the point which directly arises before us in this appeal was dealt with either directly or indirectly. *Kanniammal* v. *Balakrishna*[2] was a case where there was an appeal and clause (2) of the third column of Article 182 of the Limitation Act specially provided that where there is an appeal, time would run only from the date of the appellate decree. The scope of clause (5) of the third column of Article 182 of the Act was discussed in *Lakshminarasimham* v. *Surayanarayana*[3]. Neither of the two decisions in *Basavayya* v. *Guravayya*[4], and *Sivaramachari* v. *Anjaneya Chetty*[5], has anything to do with the question, which falls for decision in this case.

1. (1911) 21 M.L.J. 546 : I.L.R. 36 Mad. 104.
2. A.I.R. 1935 Mad. 557.
3. (1947) 2 M.L.J. 443.
4. (1951) 2 M.L.J. 176.
5. (1951) 2 M.L.J. 245.

The decision in *Vydianatha Aiyar* v. *Subramanian Pattar*[1], undoubtedly appears at first sight to suport the appellant's contention. In that case a decree in a Second Appeal was passed on 30th July, 1906, which ran as follows:

"Appellant (defendant) do pay respondent (plaintiff) Rs. 64-11-4 for his costs in this second appeal, Rs. 78-3-7 for his costs in the memorandum of objections and also his costs in the lower Appellate Court which will be ascertained and taxed by that Court."

The costs in the lower appellate Court were ascertained by that Court on 1st December, 1906. The application for the execution of the whole decree was made on 7th August, 1909, *i.e.*, more than three years after the decree in Second Appeal but within three years after ascertainment by the lower appellate Court. It was held by a Division Bench of this Court (Benson and Sundara Ayyar, JJ.) that the execution of the decree was not barred. It was contended before the learned Judges that though the execution was not barred so far as it related to the costs of the lower appellate Court, the rest of the decree for costs was barred, as execution could have been applied for with respect to it immediately after the date of the decree of this Court in Second Appeal. The learned Judges rejected the contention applying by analogy the principle well-established relating to the execution of a decree, which was the subject-matter of an appeal in whole or in part. They held that in the case before them the decree must be taken as a whole for deciding the question of limitation.

Mr. T. M. Krishnaswami Ayyar strongly pressed upon us this decision as fully supporting his contention. But there are observations in the same judgment, which are very important, though they are hypothetical. The learned Judges say:

"If the direction were that the costs of the lower appellate Court should be paid when ascertained by the Subordinate Court, the case might be different. We are of opinion that the decree must be interpreted as one for payment of a certain sum of money composed of three items, and one of these items, namely, the costs of the lower appellate Court was not ascertained until the 1st December, 1906."

It was evidently the view of the learned Judges that if the decree had been for the payment of costs of the Second Appeal and the memorandum of objections and the decree also directed the payment of the costs of the lower appellate Court when ascertained by that Court, then the decree in so far as it directed payment of the costs in the High Court, time would run from the date of the decree in the Second Appeal; but so far as the costs of the lower appellate Court were concerned, time would run only from the date on which they were ascertained by the lower appellate Court. In our opinion, the case before us must be governed by this rule. Here there was a decree passed on 16th March, 1946 directing delivery of possession and in the absence of any mention of time, the decree for possession became executable from the date of the decree. There was not even a decree as such for payment of mesne profits from the date of plaint. The decree only directed that the mesne profits from the date of plaint be determined by a separate petition under Order 20, rule 12, Civil Procedure Code. There is no analogy between the decree in the present case and the decree in *Vydianatha Aiyar* v. *Subramanian Pattar*[1], which the learned Judges construed as a decree for payment of a certain sum of money, though composed of three items. The learned Judges in that case refused to follow a judgment of Subramania Ayyar and Boddam, JJ., in C.M.A. No. 74 of 1903, which is unreported, but was brought to their notice. In that case the decree directed payment of costs and mesne profits, mesne profits being left to be ascertained subsequently in execution. The application for execution was presented more than three years after the decree, but within that period after the ascertainment of the mesne profits. The learned Judges held that the application was barred with respect to the costs, but not with regard to the mesne profits. The learned Judges in *Vydianatha Aiyar* v. *Subramanian Pattar*[1], found themselves unable to follow the decision. They observed as follows:

"With all deference to the learned Judges we are unable to follow the decision. The policy of the Limitation Act in the case of execution of decrees is in our opinion to lay down a simple rule and to treat the decree as a whole except when the decree itself directs that different portions of the relief granted are to be rendered by the defendant to the decree-holder at different times."

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1. (1911) 21 M.L.J. 546: I.L.R. 36 Mad. 104.

It may be that the decree in the unreported case can be construed as a decree for payment of a certain sum of money composed of two items, namely, costs and mesne profits, and as one item had remained to be ascertained, time would not run until such ascertainment and the decree in its entirety could be enforced. Clause (1) of the third column of Article 182 clearly specifies the date of the decree or order as the time from which period begins to run for the execution of the decree. So far as the relief of possession is concerned, the date of the decree must be taken to be 16th March, 1946.

There is another way in which the question may be approached, having regard to what has happened in this case. Clause (5) of column (3) of Article 182 prescribes that the time for execution of a decree would be three years from the date of the final order passed on an application made to the proper Court for execution or to take some step in aid of the execution of the decree or order. It has been held that such an application need not be for the execution of the entire decree. One of the decisions cited by Mr. T. M. Krishnaswami Ayyar is authority for this position *Lakshminarasimham* v. *Suryanarayana*[1]. E. P. No. 278 of 1946 was an application in accordance with law to the proper Court for execution of the decree in the suit. No doubt that related only to the relief of possession. The final order passed on that execution petition was on 24th February, 1947. A second application, whether it be for the relief of possession, or for mesne profits, or for both, should have been filed within three years from the date of that order. It is true that the mense profits were not determined till 1953, but if the decree-holder wanted to keep alive the decree, it was his duty to have filed an application for executi on within three years from the date of the dismissal of E.P. No. 278 of 1946. The present E. P. in 1954 was barred also under this provision.

Though it was not cited before us, we have been able to find one decision of the Calcutta High Court, which appears to be on principle directly in point. In *Satish Chandra* v. *Sarat Kamini Devi*[2], a decree was passed on 23rd January, 1922 for possession as well as mesne profits. The order was made by the lower appellate Court for sending the case to the trial Court for ascertainment of mesne profits. The defendant appealed against the decree to the High Court. That appeal was dismissed on 17th July, 1923. Subsequently an enquiry was made as to the amount of mesne profits according to Order 20, rule 12, Civil Procedure Code. This was on 30th April, 1926. On 24th March, 1927 the decree-holder applied for execution of the decree both for delivery of possession as also for recovery of mesne profits. The Courts below had held that time should run from the date of the final disposal of the case, namely, from the date when mesne profits were assessed, that is in April, 1926. The judgment-debtor contended that limitation for the execution of the decree for possession ran from 17th July, 1923, when the appeal to the High Court was dismissed. The contention on behalf of the decree-holder was that the Courts were right in holding that limitation ran from April, 1926 on the ground that it was an entire decree which the decree-holder was entitled to execute and so long as the mesne profits had not been ascertained, the decree was only a preliminary one. The learned Judges accepted the contention of the judgment-debtor. We agree entirely with the reasoning of the learned Judges and we extract it below :—

"Now a suit for possession as well as mesne profits, may be taken to be a suit for two claims joined together for which two separate suits may be brought. Order 11, rule 4, Civil Procedure Code, entitles the plaintiff to join the two claims for possession and mesne profits in one suit. When a decree is made for possession, that portion of the decree is final and when a decree is made for mesne profits in that suit, it is only preliminary, because the final decree for mesne profits cannot be made unless the amount due is found upon further enquiry. Therefore, further proceedings have to be taken for ascertaining the amount due for mesne profits, before the claim for mesne profits can be completely disposed of. In such a suit, although one decree is made, it is partly preliminary and partly final. The final part of the decree can be executed apart from the preliminary part, and it falls within the provisions of Article 182, Limitation Act. Time for execution of the decree for possession, therefore, runs at the latest from the date of the final decree of the appellate Court. The Judgment and Order of the Court below so far as it holds that the application for execution of the decree for possession is not barred by limitation must be set aside and we hold that part of the application must stand dismissed with costs".

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1. (1947) 2 M.L.J. 443

2. A.I.R. 1929 Cal. 383.

The learned Judges held that the decree-holder will be entitled to proceed with the execution of that part of the decree relating to the award of mesne profits.

For the reasons set out above, we agree with the Courts below and Ramaswami, J. that the execution petition filed by the appellants, which was confined to the relief of possession, was barred by limitation. The appeal is dismissed with costs.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Seshasayee Brothers, Ltd., Tiruchirappalli .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), *sections* 4 (3), (vii), 10 (2)(xv) *and* 12-*B—Applicability and scope of—Assessee managing agent of several concerns including a chemical manufacturing company—Director deputed to undertake tour of foreign countries and to attend conference of chemical manufacturers—Claim to deduct expenditure as business expenditure—Maintainability—Burden of proof—Assessee and another obtaining licence for new project but selling same for profit—Income from sale—Assessability as capital gains—Claim to exemption as casual income or windfall—Sustainability.*

The assessee firm, which was the managing agent of the Mettur Chemical and Industrial Corporation, Ltd. deputed R., one of its directors, to attend a conference of chemical manufacturers in London and the corporation bore the expenses of that director, R., to the extent of Rs. 9,995. The assessee claimed that advantage was taken of this opportunity to depute R. to visit other countries, namely, Switzerland, Canada and the United States and acquaint himself with the manufacturing conditions. The assessee was the managing agent not only of the Mettur Chemical and Industrial Corporation. Ltd., but of various other concerns as well. Chemicals were not the only line of business in which the assessee interested itself.

The assessee claimed a sum of Rs. 14,625 representing the expenses of its director, R., as a permissible deduction from the assessable profits under section 10 (2) (xv) of the Income-tax Act.

The assessee did not furnish details of the places visited by its director in the United Kingdom Switzerland, Canada or the United States, or any material to find out whether the trip was in part or whole for pleasure. The Appellate Tribunal was of opinion that the experience, if any, gained by the director by his tour abroad was a benefit of an enduring nature and that the expenditure incurred should be of a capital nature and disallowed the claim.

Held on reference under section 66 (1).—(1) that the assessee claiming the deduction had to convince the Department that the trip undertaken by the director was in the interests of the firm, and that the expenses satisfied the tests prescribed by section 10 (2) (xv) of the Act, and having failed to discharge the burden in that respect was not entitled to the benefit of section 10 (2) (xv), although the Tribunal was not correct in its opinion that the expenses were of a capital nature.

The assessee in association with one R. M. and D. M. constituted a firm styled R.M. & Co. which was formed to promote the manufacture of Vanaspathi products and obtained a licence from the Government of India for the purpose, but later withdrew from the project and surrendered the licence to another group in which D. M. still figured and in exchange, the assessee partnership got a sum of Rs. one lakh. Deducting the expenses incurred amounting to Rs. 18,000, Rs. 82,000 was divided as net profits between the assessee and R.M. The payment was received in April, 1946. There was, however, no evidence produced by the assessee to show or to indicate when the licence was sold.

There was no evidence to show that either the partnership or the assessee firm did any business in promoting companies or in obtaining and selling licences for manufacture of products; nor was it the case of the Department at any stage.

Held : That the licence which the partnership, of which the assessee company was a member, obtained was a valuable asset, and a capital asset, and the amount received by the assessee as its share of the proceeds of the sale thereof was a capital receipt in its hands falling within the scope of section 12-B of the Income-tax Act and was not a trading receipt under the head " business " in section 10; and it was not also exempt under section 4 (2) (*vii*) of the Act, as something of a casual nature or windfall.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras (B) Bench under section 66 (1) of the Indian Income-tax Act, 1922, (Act XI of 1922) in R.A. Nos. 366 and 367 of 1954-55 (I.T.A. Nos. 5422 and 5560 of 1953-54, assessment year 1947-48) on its file for decision on the following questions of law, *viz.*—

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* Case Referred No. 18 of 1955. 21st March, 1960 (1st Chaitra, 1882, Saka).

" (1) Whether on the facts and in the circumstances of this case, the sum of Rs. 14,625 representing expenses of the foreign tour of one of the directors, is allowable as a proper deduction from the assessable profits under section 10 (2) (*xv*) of the Indian Income-tax Act?

(2) (*a*) Whether on the facts and in the circumstances of the case the sum of Rs. 41,000 received by the assessee company is exempt under section 4 (3) (*vii*) of the Income-tax Act ?"

If the answer is in the negative,

(2) (*b*) " whether it is assessable under the head ' business ' under section 10 or under the head ' capital gains ' under section 12-B of the Indian Income-tax Act ?"

T. V. Balakrishnan, for Applicant.

C. S. Ramarao Sahib, Special Counsel for Income-tax and *S. Ranganathan*, on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The questions referred to this Court under section 66 (1) of the Income-tax Act were :

(1) " Whether on the facts and in the circumstances of this case, the sum of Rs. 14,625 representing expenses of the foreign tour of one of the directors, is allowable as a proper deduction from the assessable profits under section 10 (2) (*xv*) of the Indian Income-tax Act ?

(2) (*a*) Whether on the facts and in the circumstances of the case the sum of Rs. 41,000 received by the assessee-company is exempt under section 4 (3) (*vii*) of the Income-tax Act ?

(*b*) If the answer is in the negative, " whether it is assessable under the head ' business ' under section 10 or under the head ' Capital gains ' under section 12-B of the Indian Income-tax Act ?"

With reference to the first question, the facts found were that Mr. Raman who was one of the directors of the assessee firm, was deputed by the Mettur Chemical and Industrial Corporation, Ltd., of which the assessee firm was the managing agent, to attend a conference of Chemical Manufacturers in London. The Corporation bore the expenses of Raman to the extent of Rs. 9,995/-. The assessee company claimed, that advantage was taken of this opportunity to depute Raman to visit other countries and acquaint himself with the manufacturing conditions. The assessee company, it should be remembered was the managing agent not only of the Mettur Chemical and Industrial Corporation but of various other concerns. Chemicals were not the only line of business in which the assessee company interested itself. Unfortunately the assessee company failed to furnish any material from which either the Department or the Tribunal could decide what was the object of the visits Mr. Raman was either deputed to undertake or actually undertook while abroad. No doubt the Tribunal was, in our opinion, not correct when it observed that the experience, if any, gained by Mr. Raman by his tour abroad was a benefit of an enduring nature, and that the expenditure incurred should be one of a capital nature. Nor can we attach any great importance to the fact, that Mr. Raman did not furnish the assessee company with a written report of what he had done abroad. If the assessee company was satisfied with what Mr. Raman had done, it was not for the Department to point out that there had been no written report by Mr. Raman to the assessee company. Still the assessee company had to convince the Department that the trip abroad was undertaken by Mr. Raman in the interests of the company, and that the expenses incurred satisfied the tests prescribed by section 10 (2) (*xv*) of the Act. The assessee company did not even furnish details of the places visited by Mr. Raman in the United Kingdom, Switzerland, Canada or United States. Whether the trip was in part or in whole for pleasure, the Department was not in a position to gauge. In the absence of materials, the Department and the Tribunal were certainly justified in coming to the conclusion, that the assessee had failed to establish the requirements of section 10 (2) (*xv*) with reference to this item of expenditure of Rs. 14,625. We therefore answer the question in the negative and against the assessee.

With reference to the second question, the relevant facts were as follow. The assessee company in association with Ravindra Mulraj and Dharmsey Mulraj Khatau constituted a firm under the name and style Ravindra Mulraj and Co. It was formed to promote the manufacture of Vanaspathi products. A license was obtained from the Government of India by that firm for that purpose. Finding that the future of Vanaspathi was uncertain, Ravindra Mulraj and the assessee company

withdew from the project. The license was surrendered to another group, in which no doubt Dharmsey Mulraj Khatau still figured, and in exchange for the license that was traded in, the partnership, got a sum of Rs. one lakh. Ravindra Mulraj was in charge of these negotiations. A sum of Rs. 18,000 had been expended, and deducting that, Rs. 82,000 was available for division amongst the partners from out of the Rs. one lakh that had been realised by selling the license. Since Dharmsey Mulraj Khatau was one of the group which had taken over the license and the right to start manufacture of Vanaspathi, he was not given any share in the sale-proceeds. The net sale-proceeds of Rs. 82,000 were divided between Ravindra Mulraj and the assessee company. The assessee company thus got Rs. 41,000 for its share. The payment was received in April, 1946. When precisely the license was sold there was no evidence to indicate, and apparently the assessee declined to avail himself of the opportunities to place that evidence on record.

The Income-tax Officer treated it as a trading receipt and brought it to tax. The Assistant Commissioner, to whom the assessee appealed held it was a capital receipt assessable to tax under section 12-B of the Act. Both the assessee and the Department appealed against that finding of the Assistant Commissioner. The Tribunal, held agreeing with the Income-tax Officer, that it was a trading receipt in the hands of the assessee. That led to the formulation of the second question we have set out above.

If only to eliminate it, we have to point out that it was not the case of the Department at any stage, that the acquisition of the license by the firm of Ravindra Mulraj Dharmsey Khatau and the assessee firm was an adventure in the nature of trade, and that the apparent formation of a company and the acquisition of license were effected with the intent to sell the license at a profit. It should also be noticed that the Department and the Tribunal accepted the contention of the assessee, that in that firm the active partner was Ravindra Mulraj.

There was certainly no evidence to indicate that either the partnership or the assessee company did any business in promoting companies or in obtaining and selling licenses for manufacture of products. The Tribunal observed in its order of appeal :

> " This is one of the business lines of the business. It cannot certainly be called casual. It is in its regular course of business as promoter and managing agents of the company."

We must confess we are unable to understand what precisely the Tribunal meant. We have pointed out there was no evidence to come to any possible conclusion, that one of the lines of the business of the assessee company was to promote companies and to sell out after the companies had been formed. Nor was it one of the regular lines of business of the assessee company to acquire licenses or permits and sell them. Nor even was it a regular line of business of the assessee company to acquire licenses or permits and sell them. Nor even was it a regular line of business of the assessee company to acquire managing agencies and sell them, though we must point out in this case no case of acquiring and selling any managing agency in return for the receipt of Rs. 41,000 could arise for consideration.

That the license which the partnership, of which the assessee company was a member obtained was a valuable asset and a capital asset in its hands could admit of no doubt. That capital asset was sold for a sum of Rs. one lakh. Rs. 41,000 which the assessee received, represented its share of that receipt. It was a capital receipt in its hands, and in our opinion the Assistant Commissioner was right in the view he took, that being a capital receipt it fell within the scope of section 12-B of the Act. It was not assessable to tax as a trading receipt.

Before the Tribunal an attempt was made by the assessee to establish that section 12-B could not apply, because the profits had accrued prior to 1st April, 1946, after which date alone there was a statutory liability to pay the tax on capital gains. We have pointed out earlier that there was no evidence to show when precisely the license was sold. Nor was there anything to show when the assessee's share of the profits accrued, independent of the actual receipt of Rs. 41,000. All

that we know is that Rs. 41,000 was received after 1st April, 1946, and the assessee failed to show that it had accrued to him at any point of time anterior to 1st April, 1946. The Assistant Commissioner was therefore right in holding that the provisions of section 12-B applied to the receipt of this item of Rs. 41,000.

From what we have said above it should be obvious that the claim of the assessee, that it was entitled to the benefit of section 4 (3) (*vii*), is erroneous. It was in connection with the business activities of the assessee that the assessee received this sum of Rs. 41,000. That it was a capital receipt in its hands did not make it any the less income from business, and it certainly could not be treated as something of a casual receipt or windfall. We answer question 2 (*a*) in the negative and against the assessee. Our answer to question 2 (*b*) is that Rs. 41,000 was assessable to tax as capital gains under section 12-B of the Indian Income-tax Act.

As neither the assessee nor the Department has wholly succeeded in this reference there will be no order as to costs.

P.R.N. — *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VEERASWAMI.

Indersain .. *Appellant**

v.

Mohammed Raza Gowher and another .. *Respondents.*

Transfer of Property Act (IV of 1882), sections 58 (f) *and* 59—*Equitable mortgage—Letter reciting deposit of documents—Registration—Necessity.*

In the case of an equitable mortgage, if the documents had been deposited before the execution of the writing reciting it, that is, if the documents had been handed over to the creditor as security for the loan and the writing or letter merely recorded a past transaction, there would be no need for registration of the letter for a valid equitable mortgage. Where, however, there was no past transaction of actual deposit of title deeds before the execution of the letter relied on, and the letter is the only evidence of the mortgage and the only document by which the mortgage was created, the letter has to be registered and if it is not registered, it cannot be admitted in evidence to prove a valid equitable mortgage by deposit of title deeds.

Appeal against the decree of the City Civil Court at Madras (Third Assistant Judge) in O.S. No. 1593 of 1955.

M. V. Ganapati, for Appellant.

C. R. Krishna Rao, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal by the plaintiff in O.S. No. 1593 of 1955 on the file of the City Civil Court, Madras, against the decree and judgment of the learned Third Assistant Judge in so far as they are against him. The suit was for the recovery of the principal and interest due in respect of a promissory note executed by the defendants on 4th July, 1961, for a sum of Rs. 8,000. The plaintiff alleged that nothing had been paid either towards principal or interest and a total sum of Rs. 10,160 was due for principal and interest on the date of suit. The plaintiff further alleged that by way of security for the moneys so advanced the defendants deposited the title deeds of the properties mentioned in the plaint schedule with the plaintiff, authorising him to hold the said documents which had been previously given to him in pursuance of a simple mortgage for Rs. 15,000 executed by the defendants in his favour, and therefore a mortgage by deposit of title deeds was created in favour of the plaintiff. The prayer was for a mortgage decree, and in the alternative for an ordinary money decree. The defence was that the suit promissory note was not executed for any cash consideration but it was executed only as security for the payment of money that may be found due on account of the purchase in auction of certain sports goods which had been pledged with the plantiff. An auction

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* C.C.C. App. No. 40 of 1957. 26th July, 1960. (4th Sravana, 1882, Saka).

admittedly was held of the goods as pre-arranged for Rs. 5,500 but the defendants found that the goods had been damaged and unserviceable and therefore did not take delivery of the said goods. The suit promissory note was not therefore supported by consideration. The defendants also pleaded that there was no valid mortgage by deposit of title deeds because the letter, dated 5th July, 1951, on which the plaintiff relied in support of his claim, required registration, and, not having been registered, was not admissible in evidence. The learned Judge found that the suit promissory note was not executed for cash consideration but it was executed as security for the payment of the amount that would be found due in respect of the auction-purchase of the sports goods by the defendants, and as the amount of the bid at the auction was only Rs. 5,500 the promissory note was supported only to the extent of Rs. 5,500. He also held that the letter, dated 5th July, 1951, required to be registered and not having been registered there was no valid equitable mortgage. In the result the learned Judge passed a decree in favour of the plaintiff for a sum of Rs. 5,500 with proportionate costs and interest at six per cent. per annum from the date of delivery of the goods, namely, 25th July, 1951, and dismissed the rest of the plaintiff's claim. He however declared that the properties mentioned in the plaint shall be a charge for the amount decreed, a direction which it is difficult to follow, having regard to the finding that the non-registration of the letter would deprive the plaintiff of a mortgage decree.

Learned counsel for the plaintiff-appellant contended that the learned Judge should have passed a decree for the entire amount claimed by him. The onus no doubt is on the defendant, as the execution of the promissory note was admitted, to prove that it was not supported by consideration. But in our opinion the defendants have adduced sufficient circumstantial evidence to shift the onus on to the plaintiff to prove that cash consideration passed. The plaintiff has not filed his accounts which would have conclusively established his case, if true, that Rs. 8,000 had been paid in cash to the defendants. The promissory note is, dated 5th July, 1951. The auction was held in the same month and Exhibit A-3, is the delivery note for the goods which were purchased by the first defendant at the auction for a sum of Rs. 5,500. The plaintiff in his evidence admitted that the highest bid was for Rs. 5,500, but according to him this money was paid to the auctioneers and he in turn got this sum from the auctioneers. If this be true, there should be indubitable evidence to prove all the material facts. The auctioneers should have been summoned to produce the receipt of the money from the defendants, and the plaintiff should have produced the receipt which presumably he must have given to the auctioneers having received Rs. 5,500. On 11th January, 1952, the defendants through their advocate addressed a letter to the plaintiff in which they clearly set up the case which has been set up by them in the present suit, namely, that no amount was received in cash as consideration for the execution of the suit promissory note. The first defendant has also given evidence in support of his case. He deposed that he never paid Rs. 5,500 to the auctioneers and he also mentioned the circumstances in which the promissory note came to be executed. We accept his evidence. On the evidence the learned trial Judge came to the correct finding, namely, that the suit promissory note is supported by consideration only to the extent of Rs. 5,500.

The next contention pressed upon us by learned counsel for the plaintiff was that a mortgage decree should have been passed because there was a valid equitable mortgage which had been created over the suit properties, and that the letter Exhibit A-2, dated 5th July, 1951, did not require registration because it recites that document had already been deposited. No doubt if documents had been deposited before the execution of that letter, that is, the documents had been handed over to the plaintiff as security for the suit loan and the letter only recorded a past transaction, then there was no necessity for registration. This, however, is not what happened. The documents, that is, the title deeds were with the plaintiff long before the suit transaction. As Exhibit A-2 itself recites, they were handed over to the plaintiff after registration of a simple mortgage of the properties in favour of the plaintiff himself. That was on 16th May, 1951. It is not suggested that the documents so delivered in pursuance of the simple mortgage were returned to the defendants and

again redeposited with the plaintiff. There was therefore no past transaction of actual deposit of title deeds before the execution of the letter in question. Therefore Exhibit A-2 is the only evidence of the mortgage and the only document by which the mortgage was created. Hence it had to be registered, and not having been registered, it cannot be admitted in evidence to prove a valid equitable mortgage by deposit of title deeds. The learned Judge was right in his finding that the non-registration of the letter Exhibit A-2 would deprive the plaintiff of his claim for a mortgage decree.

Curisouly the learned Judge in spite of the finding that the plaintiff was not entitled to a mortgage decree, nevertheless declared that the properties mentioned in the plaint shall be a charge for the amount decreed in favour of the plaintiff. This direction is certainly unwarranted ; but we cannot set it aside because the defendants have not filed an appeal from that portion of the decree and judgment relating to the charge. The appeal fails and is dismissed with costs.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Marthandan Velar Subramanian Velar .. *Appellant**

v.

Ramasubramania Iyer Sathanu Subramania Iyer and others .. *Respondents.*

Hindu Law—Alienation—Life-estate-holder—Daughter taking self-acquired property of father under family partition with powers of alienation but without powers of disposition by will or otherwise providing for inheritance—Nature of estate—Mortgage by life-estate holder—Validity.

A family partition under which a Hindu daughter takes the self-acquired properties of her father for life with powers of disposition *inter vivos* and without restraint on alienation or restriction on enjoyment, but without power to devise by will after her lifetime or of providing for further inheritance, clothes her with powers far wider than those of a Hindu woman owning a woman's estate under the Hindu Law. She holds a life estate which necessarily partakes of the character of what is termed " Life Interest " under the English Law of Real Property. Such a life-estate-holder has unfettered powers of alienation during her lifetime and the person taking subsequently would take what she dies possessed of. By executing a mortgage over the property she does not deminish the corpus of the estate but only creates a charge, and it would be perfectly valid and binding, on the remainder-man or reversioner, if supported by consideration, without any considerations of legal necessity or benefit as in the case of a limited female owner under the Hindu Law.

Appeal against the Decree of the District Court of Kanyakumari at Nagarcoil in Original Suit No. 220 of 1952.

S. Chellaswami, for Appellant.

S. Padmanabhan, for Respondents.

The Court delivered the following

JUDGMENT.—The appellant is the seventh defendant in the Court below in a suit by the plaintiff for declaration of his title to certain properties after setting aside certain alienations, for recovery of those properties with mesne profits and allied reliefs. We are not now concerned with most of the matters in controversy decided in this suit as between the parties. We are concerned exclusively with a mortgage executed by a life-estate-holder Saradambal (Exhibit XIV—Exhibit B) in favour of the seventh defendant (appellant for Rs. 1,000 on 32-12-1124 M.E.)

There are two simple questions for determination in this appeal. The first is whether this life-estate-holder (Saradambal) had the power to make this disposal of property *inter vivos* during her period of enjoyment. The second is whether the mortgage itself was supported by consideration, with reference to its constituent items, and, if so, to what extent.

The facts are that one Sundraraja Iyer was the father of three daughters, of whom Saradambal was one and defendants 2 and 3 were the others. The first

*Appeal No. 177 of 1957. 3rd January, 1961. (13th Pausa, 1882, Saka).

defendant in this suit is the husband of Saradambal, but that is not a matter that is strictly pertinent to the aspect that arises for decision now. Admittedly, there was a partition deed in the family (Exhibit A) under which Saramdabal took a life-estate in the properties of the suit. The learned Additional District Judge has throughout misconceived her status as that of a Hindu woman owning properties in a limited estate under the Hindu Law. This led him to launch into an enquiry concerning the necessity for the mortgage in favour of the seventh defendant (appellant), which really does not arise). The learned Judge stated that :—

> " It is well-settled that the alienation effected by a limited female owner like a daughter can be upheld only if it is for legal necessity, or for the benefit of the estate or with the consent of the next reversioners. Therefore, the alienee of a limited female owner has to prove that the impugned alienation is supoprted by consideration and legal necessity, or that the alienee after reasonable enquiry as to the necessity acted honestly in the belief that the necessity existed."

I am citing this passage from the judgment of the Court below in order to show that the lower Court really missed the point in issue upon this aspect of the suit. It is now conceded before me, upon the facts, that Sundararaja Iyer was in possession of these properties as his self-acquired properties, as far as we can judge, and that we have no right whatever to assume that Saradambal would have inherited these properties as the holder of a Hindu woman's estate, otherwise than under Exhibit A. In fact, if Exhibit A had not come into existence, nothing whatever could be said of Sardambal's right to the property. Consequently, one cardinal fact that has to be affirmed before we go further is that, upon the evidence, it is irrefutably established that Sardambal held the properties, not as a Hindu woman owning a limited estate under the Hindu Law, but as the holder of a life-estate under a family settlement. This life-estate necessarily partakes of the character of what are termed "Life Interest "under the English Law of Real Property, since it really derives from that law.

The question is whether the owner of such a life-estate would have powers of disposition *inter vivos*, so long as she held the estate, as distinguished from powers of devising the properties after her by means of a will, or otherwise providing for the inheritance. Before turning to the decisions of this Court, I may refer to In re *Thomson's Estate* : *Herring* v. *Barrow*[1]. James, L.J., observed :—

> " The Vice-Chancellor was of opinion that the widow took no further estate than a life-estate, and that at most she had no further power of disposition than by act *inter vivos*. At her decease, should there be anything remaining, the testator gives it over."

This view of the Vice-Chancellor was affirmed. A similar case came up for decision before this Court in *Sarvabhotla Venkata Chandikamba* v. *Venkata Rao*[2], Krishnan and Odgers, JJ., held interpreting the words of disposition in the document in that case, and following In re *Thomson's Estate*: *Herring* v. *Barrow*[1], cited by me earlier, that there could be a life-estate with powers of disposition *inter vivos*, and that such an interest must be spelt out of the terms of the particular disposition or document. I may add that, under the English Law as it stands at present, the tenant holdig a life-interest undoubtedly possesses an absolute power of alienation during his life, under the clauses of the Settled Land Act (*see* Cheshire's Modern Real Property, 8th Edition, page 194).

In the present case, it is not actually necessary to go so far as to hold that Saradambal possessed a life-estate, with unfettered powers of alienation *inter vivos* during her life-time. Actually, she has not diminished the *corpus* of the estate by any such sale, or gift, but has merely created a charge upon certain property in favour of the seventh defendant (appellant), for moneys raised by her for her own expenses. But, if the matter had to be decided upon the terms of the document (Exhibit A), I would certainly hold that Saradambal appears to have possessed a life-estate with powers of disposition *inter vivos*. There is no restriction upon alienation, and the language used is such as to imply that she could enjoy without restriction, and that, presumably, the person taking subsequently would take what she died possessed of. It is only in respect of a devise of the property by will after

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1. L.R. (1880) 14 Ch.D. 263. 2. (1926) 53 M.L.J. 557.

her lifetime, or of providing for further inheritance, that she was restrained by virtue of the effect of the document, like all other holders of a life-interest. Certainly, the document clothed her with powers far wider than those of a Hindu woman owning a woman's estate under the Hindu Law.

The only question, therefore, that remains for consideration is whether the mortgagee (appellant) could plead that he actually parted with the amounts specified in the document for obtaining this mortgage and, if so, what the rights are of the remainder-man who has succeeded to the estate.

Here, discussion of the facts by the learned Additional District Judge is considerably affected by the confusion he has made, which I have referred to earlier, between the existence of legal necessity, and the payment of moenys under the transaction. Further, since he cast the burden of proof entirely upon the mortgagee to affirmatively establish both facts, he has paid very little regard to the fact that the *bona fides* of the mortgagee in this case appear to be beyond dispute. There is absolutely no connection established between Saradambal and this mortgagee, and there are no reasons at all alleged why Saradambal should have proceeded to create a usufructuary mortgage in favour of this appellant, without consideration. Several of the items relate to discharge of antecedent debts of the life-estate-holder and, had the principles been appreciated in proper perspective, the evidence upon this aspect would have been accepted at the face value as it deserved to be. In brief, upon going through the evidence in the record, I see no grounds whatever to assume that the several items of consideration in the document have not been established. The presumption of law would also be that the document was fully supported by consideration, being a registered instrument of mortgage. It is only with reference to one item, namely, 800 fanams paid to Chempakakannu Pillai Nagaru Pillai under the second recital, that proof is lacking except the *ipse dixit* of the appellant. I hence would exclude this item from the consideration proved, and hold that the document is supported by consideration to the extent of Rs. 1,000 minus this 800 fanams or nearly Rs. 900 in the aggregate. I may add that even the lower Court has not held that the document was unsupported by consideration, or that it was spurious. On the contrary, the lower Court has upheld the consideration to a partial extent ; it has negatived other items because of the confusion between consideration and the existence of legal necessity which I have referred to earlier.

It follows that the appellant is entitled to succeed to the extent of nearly Rs. 900 as the consideration under a valid and subsisting mortgage, which would certainly bind the remainder-man (plaintiff-respondent).

Upon these facts, it is clear that the plaintiff-respondent is entitled to redeem the mortgage in favour of the appellant, after depositing the necessary amount. There is a further complication in that the life-estate-holder has also made her own personal properties as additional security, for the enforcement of this charge. Admittedly, those personal properties would be liable under the mortgage, and this is not in controversy. Hence, I further find that if the remedies are to be worked out with regard to the claim of plaintiff-respondent for redemption of the mortgage, and the rights of the appellant to the sum secured, in any appropriate proceeding, the properties charged as additional security shall be liable in the first instance and that, only failing this enforcement need the properties of the estate to which the plaintiff-respondent has succeeded be made liable.

The appeal is accordingly allowed with these directions. The parties will bear their own costs throughout.

This case having been set down for being mentioned this day, the Court made the following

ORDER :—The plaintiff-respondent is held entitled to redeem the mortgage in this suit itself, without being driven to the necessity of filing a separate suit.

P.R.N. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KAILASAM.

Godavari Bai Ammal .. *Petitioner**

v.

P. S. Seshadrinathan (Receiver in O. S. No. 149 of 1955, Sub-Court, Tiruchirapalli) .. *Respondent.*

Evidence Act (I of 1872), section 34—Scope of.

It is no doubt true that entries in books of account regularly kept in the course of business are relevant under section 34 of the Evidence Act. But as provided in the *Illustration* to the section itself the entries by themselves are not sufficient to charge any person with liability for the debt unless there is evidence to prove the debt.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Decree of the Court of the First Additional District Munsif of Tiruchirapalli, dated 24th December, 1958 and passed in S.C. No. 212 of 1957.

K. Parasaran, for Petitioner.

T. R. Ramachandran, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant in a small cause suit for recovery of a sum of Rs. 194-15-0 due on account of dealings which he had with one Krishnaswami Konar is the petitioner herein. The plaintiff is the Receiver appointed in O.S.No. 149 of 1955 to collect the outstandings due to the estate of the deceased Krishnaswami Konar. On the strength of the entries in the account-book of the deceased Krishnaswami Konar, the suit was filed. The learned District Munsif decreed the suit holding that the defendant had dealings with the deceased Krishnaswami Konar and that according to Exhibit A-1, the ledger page of Krishnaswami Konar, relating to the defendant, the defendant was liable to pay the sum.

Mr. Parasaran appearing for the petitioner contends that Krishnaswami Konar's account-book and the ledger page relating to the defendant were not proved and that the ledger page by itself will not be evidence. Section 34 of the Indian Evidence Act provides that entries in books of account regularly kept in the course of business are relavant. Such a statement shall not be alone sufficient evidence to charge any person with liability. The *Illustration* to the section provides that entries are relevant but are not sufficient without other evidence to prove the debt. The records do not show that the defendant consented to all the entries in Exhibit A-1. It appears that both the parties consented to filing of a copy of the ledger page. The account relating to the defendant has not been properly proved. The suit must fail.

The petition is allowed. The Receiver will take his costs out of the estate.

R.M. *Petition allowed.*

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* C.R.P. No. 1208 of 1959.

22nd November, 1960.
(1st Agrahayana, 1882, Saka).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

Sri Bava Oushadeeswaraswami Temple, Tiruthuraipoondi, represented by its Executive Officer .. *Appellant**

v.

M. Subbiah Mudaliar .. *Respondent.*

Lease—Unconditional agreement to pay rent—Enforcement of term as to—Court—If has power to relieve parties from their obligation on grounds of equitable principles.

Where there is an unconditional agreement for payment of rent irrespective of *rajeegam* and *deiveegam* Court has no power to relieve against payment of it on the ground that the crops had been lost by cyclone.

Courts can only look to the terms of the contract between the parties and enforce them subject to the law. There is no power in Courts to depart from the terms of a contract and relieve a party from his obligation under it on grounds of equitable principles.

Appeal against the Decree of the District Court, East Thanjavur at Nagpattinam, in Appeal Suit No. 33 of 1957, preferred against the Decree of the Court of the District Munsif of Tiruthuraipoondi in Original Suit No. 242 of 1955.

T. M. Chinnayya Pillai, for Appellant.

K. S. Naidu and *K. S. Bhaktavatsalam,* for Respondent.

The Court delivered the following

JUDGMENT.—This Second Appeal by the plaintiff arises out of a suit for recovery of arrears of rent due on a lease of properties for fasli 1362 and of the price of seed and *thasucooly* advanced by the plaintiff to the defendant. The plaintiff obtained a decree in respect of the price of seed and *thasucooly.* In other respects the suit was dismissed and the plaintiff's appeal was unsuccessful.

The ground on which both the Courts below declined to decree the rent due under the lease agreement was that there was a cyclone as a result of which the defendant entirely lost the crops. The further ground relied on by them was that it was common for land-owners to give remissions despite a term in the lease agreement that rent should be paid unconditionally. The lower appellate Court also considered that the claim relating to unconditional payment was included in the lease more or less *in terrorem* and was never intended to be strictly acted upon. The aggrieved plaintiff has come to this Court in Second Appeal.

It is now well-settled, so far as this Court is concerned by the judgment of a Division Bench of this Court in *Sri Kampahareswaraswami Devasthanam* v. *Appasami Padayachi*[1], that in the case of an unconditional lease it is not within the power of the Court on equitable grounds to relieve the lessee from his obligation under the contract to pay the entire rent. It is not disputed that in this case the lease agreement provided for payment of rent as stipulated irrespective of *rajeegam* or *deiveegam.* That being the case the fact that as a result of cyclone the defendant entirely lost his crops, cannot relieve him against his liability under the contract. Nor can I find any justification for the view of the lower appellate Court that, notwithstanding such conditional terms, the lessors do grant remissions on account of unforeseen damage to crops. It is always open to a lessor to remit a portion of the rent if he so desires. But the Courts can only look to the terms of the contract and enforce the same. They cannot depart from the terms which the parties have agreed to. Equally there appears to be no basis for the view of the lower appellate Court that the term for payment of rent unconditionally was only meant *in terrorem* and not intended to be acted upon.

Sri K. S. Naidu, the learned counsel for the respondent, contended that in Appeal No. 1172 of 1953 the lease was for a term of years unlike in the present case where the lease was only for the one fasli. According to the learned counsel, the

* S. A. No. 221 of 1959. 13th December, 1960.
(22nd Agrahayana, 1882, Saka).

1. A. S. No. 1172 of 1953.

principle that an unconditional lease will have to be enforced in accordance with the terms was not applicable to a lease for a year only. I am unable to agree. Although in that appeal the lease was for a term of years, the ground of the decision is to be found in the following sentences :

> " We cannot agree with the learned Subordinate Judge that there is power in the Court on some kind of equitable principle to relieve respondents from the obligations under Exhibit A-3."

That being the case, the fact that the lease was only for one year can make no difference to the position that the Court has no power to depart from the terms of the contract.

The learned counsel for the respondent next urged that the plaintiff's claim for interest on the arrears of rent for fasli 1362 could not in any case be granted. Before the suit was filed it does not appear that the plaintiff made any demand on the respondent for payment of interest on the arrears. I do not, therefore, consider that the plaintiff should be permitted to recover the interest claimed in the plaint.

In the result the Second Appeal is allowed. The judgment and decree of both the Courts below in so far as they related to the arrears of interest due for fasli 1362 are set aside. In addition to what has been decreed to the plaintiff, there will be a decree also for the arrears of rent claimed by the plaintiff for fasli 1362. The plaintiff will be entitled to its costs in the Courts below in respect of the arrears of rent decreed in this Court. There will be no costs in the Second Appeal.

No leave.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

Roy and Chatterjee (Private) Ltd. .. *Petitioner**

v.

The Scindia Steam Navigation Co., Ltd. at present Messrs. Hindustan Shipyard Ltd., and another .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 8-*A, rules* 1 *and* 2—*Party sought to be impleaded as third party—If can raise question of Jurisdiction.*

Rule 2 of Order 8-A of Civil Procedure Code enables the third party to raise all grounds to the action as would be available to him as against the party defendant who seeks to bring him on record. The third party can raise the question of jurisdiction of the Court in defence in the application to implead him as third party.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the City Civil Court, Madras (IV Assistant Judge) dated, 30th November, 1959 and made in I.A. No. 937 of 1959 in O.S. No. 445 of 1952.

V. Devarajan, for Petitioner.

Messrs. King and *Partridge, P. S. Srisailam* and *N. Krishnamurthi*, for Respondents.

The Court delivered the following

JUDGMENT.—This revision raises the question of the propriety of the dismissal of an application made under Order 8-A, Civil Procedure Code. The petitioner was the third defendant in a suit, O.S. No. 445 of 1952 on the file of the IV Assistant Judge, City Civil Court. The plaintiff was constituted the agent by the Mysore Iron and Steel Works, Bhadravati, (first defendant) for the purpose of collecting 250 tons of scrap iron at Visakapatnam for the Scindia Steam Navigation Company, who originally figured as the second defendant in the suit. The plaintiff was carrying on business at Madras. He in his turn, made the third defen-

*C.R.P. No. 2151 of 1959. — 22nd September, 1960. (31st Bhadra, 1882, Saka.)

dant, who was carrying on business at Visakapatnam, his agent for taking delivery of the scrap iron from the second defendant and forwarding it to the Mysore Iron and Steel Works at Bhadravati. The third defendant took delivery from the second defendant and passed a receipt for full delivery of the 250 tons. It was claimed by the plaintiff that the delivery was made not on weighment basis but on measurement basis. At Bhadravati a shortage of about 68 tons was found and the plaintiff had to refund a sum of over Rs. 4,000, representing the value of the deficit quantity, to the first defendant, the Mysore Iron and Steel Works. He accordingly sued defendants 2 and 3 seeking to recover the amount from the one or the other. A question of jurisdiction was raised and it was found by the trial Court that it had no jurisdiction in respect of the claim against both defendants 2 and 3. A revision was taken to the High Court. The High Court agreed that the trial Court had no jurisdiction in respect of the claim against the Scindia Steam Navigation Company and gave a choice to the plaintiff to proceed only against the third defendant in the City Civil Court or to file a plaint against both the Scindia Steam Navigation Company and the third defendant-petitioner in the Visakapatnam Court. The plaintiff re-presented the plaint in the City Civil Court confining his relief as against the third defendant only.

At this stage, the third defendant filed a third party application seeking to implead the second defendant as a third party on the ground that the third defendant is entitled to indemnity as against the Scindia Steam Navigation Company. The proposed third party, the Scindia Steam Navigation Company, opposed the petition on the ground that the third defendant himself could not have any cause of action against the second defendant at Madras.

The learned Assistant Judge came to the conclusion that the objections raised by the Scindia Steam Navigation Company was sound and that this party could not be impleaded. It is against this order that the present revision petition is directed.

The principal ground that has been raised is that the learned trial Judge has not followed the decision in *Subbulal Saheb* v. *Perianna Pillai*[1]. In this case, the question that was considered was whether in support of an application to implead a third party, privity of contract between the applicant and the third party was essential. It was held that it was not. The learned Chief Justice observed :

> " Generally speaking, there will not be such a privity in a claim falling under Order 8-A which the defendant sets up against a third party. If there was direct privity, then the third party would have been necessary. . . . . ."

I cannot see how this decision has been misapplied by the learned Assistant Judge. In paragraph 4, the trial Court observed :

> " It is true that it is not necessary that for an application to implead a person as third party under Order 8-A, rule 1, Civil Procedure Code, there should be privity of contract between the plaintiff and a third party. So, the fact that the plaintiff has been found to have no jurisdiction to entertain this suit against the second defendant in this Court will not stand in the way of the third defendant having the second defendant impleaded in this suit as a third party provided the third defendant is able to establish a cause of action against the second defendant within the jurisdiction of this Court."

Then the trial Judge proceeded to hold that in order to bring a third party on record, the defendant seeking to do so should establish that the claim as between them was capable of adjudication by the Court and was within the jurisdiction of that Court. It seems to me that this is the correct approach to the question. Rule 2 of Order 8-A states :

> " The third party shall, as from the time of the service upon him of the notice, be deemed to be a party to the action with the same rights in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant."

This rule clearly enables the third party to raise all grounds to the action as would be available to him as against the party-defendant who seeks to bring him on record ; that is to say, if the petitioner, who is the third defendant in the suit,

1. (1957) 70 L.W. 493.

sued the third party in a separate action, such third party would be entitled to arise the question of the jurisdiction of the Court in defence. Such a defence would also be open to the third party in this application to implead him as a party. It is that aspect of the matter that the learned Assistant Judge has canvassed.

It was admitted that the proposed third party carries on business at Visakhapatnam. The petitioner, who is the third defendant, also carries on business at Visakhapatnam, and the contract as between them relating to the delivery of scrap iron was entered into at Visakhapatnam and was fulfilled at Visakhapatnam. If the plaintiff's action against the proposed third defendant failed on the question of jurisdiction on the basis of the above facts (so it was found by the High Court in the Civil Revision Petition), the position is exactly similar in so far as the third defendant's petition to implead the second defendant as third party is concerned. It was open to the proposed third party to raise the question of jurisdiction, and the view taken by the learned Assistant Judge is to my mind correct.

The petition fails and is dismissed with costs.

K.L.B. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE KUNHAMED KUTTI.

P. H. Sanghvi carrying on business in yarn, etc., at No. 465, Mint St., Park Town, Madras, by his duly constituted Power of Attorney Agent, Devsee Moolchand and another .. *Appellants**

v.

Asher Textiles, Ltd., a company registered under the Indian Companies Act, 1913, carrying on business at Tirupur, Coimbatore District .. *Respondent.*

Civil Procedure Code (V of 1908), section 20—Jurisdiction—Parties agreeing to vest jurisdiction in one of the two competent Courts.

Practice—Contract between parties agreeing to vest jurisdiction in one of two competent Courts—Scope of.

It is no doubt true that where there are two competent Courts which can try and deal with the subject-matter of a claim on a contract it would be open to the parties to agree that the disputes arising under the contract should be adjudicated by one of such Courts. It is equally well settled that contracts which attempt to oust the jurisdiction of one of the Courts, which under the law can take cognizance of the suit, will have to be strictly construed.

Where the clause in a contract stipulated that all proceedings in respect of it shall be taken in a Court of original jurisdiction in Tirupur and it so happens that only a District Munsif's Court exists at that place with limited pecuniary jurisdiction, a suit claiming an amount beyond the pecuniary jurisdiction of the said Court will be outside the purview of the clause. Such a clause cannot be interpreted to mean any Court having original jurisdiction over Tirupur, such as the Sub-Court at Coimbatore. The general rule of construction of a written contract is that its language should be understood in its ordinary and natural meaning even though such a construction may not carry out the purpose, which the parties may be supposed to have intended.

Dharmal Marwari v. *Jankidas Baijnath*, (1944) 49 C.W.N. 123 and *H. K. Dada (India) Ltd.* v. *M. P Sugar Mills Co., Ltd.*, (1954) 1 M.L.J. 434, referred.

It will not however be open to the parties by agreement to vest a jurisdiction in a Court which it did not possess and deprive an only Court of the jurisdiction which it has.

Appeals against the Order of the Third Assistant Judge of the City Civil Court at Madras dated 25th January, 1958 and made in O.S. Nos. 885 of 1954 and 1461 of 1955.

V. C. Gopalaratnam, V. Devarajan and *V. S. Rangachari*, for Appellants.

A. Balasubramaniam and *K. N. Venkataramani*, for Respondent.

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*A.A.O. Nos. 219 and 220 of 1958. 13th December, 1960. (22nd Agrahayana, 1882, Saka.)

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—These appeals are filed against the Orders of the Third Assistant City Civil Judge, Madras, directing the plaints in O.S. Nos. 885 of 1954 and 1461 of 1955 to be returned for presentation to the proper Court on the ground that the Court at Madras has no jurisdiction to entertain the suits. The suits were filed by the respective appellants for recovery of damages for alleged breaches of contract committed by the respondent by reason of non-delivery of goods agreed to be sold. The claim in O.S. No. 885 of 1954 was for a sum of Rs. 6,300, and that in O.S. No. 1461 of 1955 was for Rs. 49,140. The latter suit was in the first instance instituted on the Original Side of this Court after obtaining an *ex parte* order of leave under clause 12 of the Letters Patent (Application No. 1839 of 1954), and it was later transferred to the City Civil Court under the provisions of Act X of 1955. The basis of the claim in the two suits are almost identical. The appellants are merchants carrying on business in yarn at Madras. The respondent company is engaged in the manufacture and sale of yarn and other textile goods. The appellants entered into various contracts with the respondent through a broker at Coimbatore for purchase of certain quantities of yarn. The contracts were in writing and they specified the count of yarn, the number of bales purchased, the rate per bale and the time for delivery. It was stipulated that the price was to be paid against delivery of the railway receipt. The contracts were subject to certain conditions of sale which were printed on the reverse of the contract note. Clause 10 of the General Conditions which alone is relevant for the present purpose states :

"All contracts shall be taken to have been made in Tirupur and all proceedings which either party to the contract may be entitled to take against the other under the contract shall be instituted in a Court of original jurisdiction at Tirupur."

The appellants complained that the respondent did not deliver the goods in accordance with the contract and that although there was a settlement under which the quantity agreed to be delivered under the contracts was reduced, the latter still defaulted in making delivery as per the revised contract and prayed for relief by way of damages. The suits were resisted on various grounds. Several issues were framed in the suits, among them being the preliminary one as to the jurisdiction of the Court at Madras to entertain the suits. The plea of the respondent was that by virtue of clause 10 of the General Conditions of the contract, the parties validly agreed to have the Courts in the Coimbatore District as the forum for deciding their disputes and that the Court at Madras could not entertain them. The respondent in the second of the two appeals had also filed an application to revoke the leave granted by this Court for the institution of the suit. It is however unnecessary to consider now whether a subordinate Court would have jurisdiction to revoke the leave granted by this Court.

The learned Assistant City Civil Judge held that part of the cause of action arose at Madras, that both the Court at Madras and that having jurisdiction over Tirupur would have jurisdiction to try the suits, and as the parties had under clause 10 of the contract agreed to have their disputes decided by the latter Court, the jurisdiction of the Madras Court should be held to be excluded. On that finding the plaints were returned for presentation to the proper Court. It is the correctness of this conclusion that is challenged in these appeals.

It is well settled that where there are two competent Courts which can try and deal with the subject-matter of a claim on a contract it would be open to the parties to agree that the disputes arising under the contract should be adjudicated upon by one of such Courts—vide *H. K. Dada (India) Ltd.* v. *M. P. Sugar Mills Co., Ltd*[1]. It can also be taken as a settled rule that contracts which attempt to oust the jurisdiction of one of the Courts, which under the law can take cognisance of the suit, will have to be strictly construed. The question therefore is whether on the terms of the contract in the present case it can be held that the jurisdiction of one of two competent Courts is outsed. Clause 10 of the contract stipulates that

1. (1954) 1 M.L.J. 434.

"all contracts shall be taken to have been made at Tirupur and that proceedings which one party may take against another in respect of the contract should be instituted in a Court of Original jurisdiction in Tirupur.

In Tirupur there is no civil Court with unlimited jurisdiction. There is only a District Munsif's Court in that place which exercises jurisdiction to the limit of Rs. 5,000. That Court will not be competent to entertain the suits above that amount. In regard to claims above Rs. 5,000, suits arising within the geographical limits of Tirupur will have to be instituted in the Sub-Court of Coimbatore. Thus the Court at Tirupur will have no jurisdiction to entertain the present suits. It is however contended for the respondent, and that contention found favour with the lower Court, that the Court at Tirupur should mean Courts having original jurisdiction over Tirupur. That interpretation involves introduction of other words in the contract. In other words, the words " in a Court of original jurisdiction in Tirupur ", should be read as " in a Court *having* original jurisdiction *over* Tirupur ". In our opinion there is no justification for the introduction of these words in clause 10 for two reasons: (1) In the earlier part of clause 10 where the words " in Tirupur " occur, the reference is obviously to the place. It is but proper that the same interpretation should be adopted when the same words are used in the latter part of the same clause. (2) The phrase " in a Court of original jurisdiction in Tirupur " is not a vague or ambiguous expression. Admittedly a Court is functioning at Tirupur, though with a limited jurisdiction. As we pointed out already, the contract is embodied in a printed form. The general conditions of sale are printed on the reverse of the contract form. It may be that the parties contemplated that cases will arise involving claims less than Rs. 5,000. In such cases, clause 10 will certainly have a relevance. It cannot therefore be said that clause 10 will be rendered meaningless if a different interpretation other than what appears from the words used therein were to be adopted. In other words, clause 10 will apply to cases where the claims under the contract will involve amount less than Rs. 5,000. But the question we have to consider is whether that clause being a part of the suit contract could be interpreted by supplying words which are not there. The general rule of construction of a written contract is that the language of the instrument has to be understood in its ordinary and natural meaning notwithstanding the fact that such a construction may appear not to carry out the view which it may be supposed the parties intended to carry out. If the natural and grammatical meaning were to be adopted in the present case, clause 10 would certainly have a meaning there being a Court situate in Tirupur itself. So far as we are able to see there is nothing in clause 10 of the contract, or in the other parts of the contract, to show that the words " in Tirupur " were intended to be used in a wider sense so as to include the Coimbatore Court as well. It may be that the bargain as understood by the respondent was that the Courts exercising jurisdiction over the seller's place of business should alone have jurisdiction. But the question that arises in this case has to be decided not so much as what one of the parties had in his mind, but what is the expressed intention of the parties under the contract. The words used are ordinary words and not technical ones for which any special meaning could be attached. Where the language is free from ambiguity and where the interpretation contended for the appellant is consistent with the natural meaning of the words, it would be beyond the powers of a Court under the guise of ascertaining the true intention of the parties to add more words. It would follow that the words " in Tirupur " could only refer to the locality and not to Courts having jurisdiction over that place, *i.e.*, the Court of which place will exercise jurisdiction over Tirupur. An almost similar question arose for consideration in *Dhanmal Marwari* v. *Jankidas Baijnath*[1]. The contract in that case stipulated that the suit should be laid at Katihar. Katihar had only a Munsif's Court which could not entertain the suit which was for an amount beyond the jurisdiction of the District Munsif's Court. The suit was therefore instituted in the Sub-Court of Chittagong. Both the learned Judges were of the view that the suit could not be entertained by the Sub-Court at

1. (1944) 49 C.W.N. 123.

Chittagong as that was not agreed to by the parties. Biswas, J., observed that the effect of the clause stipulating for the filing of suits at Katihar in regard to a contract, the claim under which was beyond the jurisdiction of the Court, was to confer jurisdiction on the Katihar Court beyond its pecuniary limits and could not therefore be given effect to. The learned Judge has stated :

> " The agreement, even if it could be regarded as valid in so far as it purported to confer jurisdiction on the Court at Katihar could, therefore, be given effect to only partially. and it is doubtful how far it could, therefore, be regarded as a valid and enforceable agreement."

Latifur Rahman, J., observed :

> " As, however, in the present case it appears that the Court at Katihar had no pecuniary jurisdiction to entertain this suit, there being only a Munsif's Court at Katihar which could not take cognizance of a suit valued at Rs. 2,020, the principle stated above will not apply. The agreement will in effect amount to divesting the only competent Court of its jurisdiction and vesting it in another which can have no pecuniary jurisdiction."

The lower Court did not follow the decision reported in *Dhanmal Marwari* v. *Jankidas Baijnath*[1], because it held that the view expressed in that case was contrary to the decision of a Bench of this Court in *H. K. Dada (India) Ltd.* v. *M. P. Sugar Mills Co., Ltd*[2]. We are unable to agree with the learned Judge that the decision in *Dhanmal Marwari* v. *Janakidas Baijnath*[1], can be distinguished in that way. In *H. K. Dada (India) Ltd.* v. *M. P. Sugar Mills Co., Ltd.*[2], the learned Chief Justice referring to the former decision observed that the effect of one of the terms of the contract in that case was to oust the jurisdiction of the only competent Court and to confer it on another which had no jurisdiction and such a term could not be enforced. It is however unnecessary to consider in the present case as to whether clause 10 will not apply to cases where the claim is less than the pecuniary limits of the jurisdiction of the Tirupur Court. Biswas, J., in *Dhanmal Marwari* v. *Jankidas Baijnath*[1], expressed a doubt whether the clause as such would be valid. It may be that in regard to contracts involving a claim within the jurisdiction of the Court at Tirupur the clause would be operative. But the validity or operation of a provision like that in clause 10 has to be judged with reference to the contract which is the subject-matter of the suit. It would follow that where the claim is beyond the pecuniary limits of Tirupur Court, that clause would have no operation on the principle that what the parties attempted to do was to confer jurisdiction upon a Court which had no jurisdiction and also depriving the only Court that had jurisdiction, of its jurisdiction. The matter can be looked at in another way as well. The parties, when they entered into the contract should be deemed to have been aware of the limits of the jurisdiction of the Court at Tirupur. When they said that the Court in Tirupur should be the forum where the disputes will have to be settled, they should be held to have impliedly agreed that where the claims under the contract are for amount of less than Rs. 5,000, the suit should be instituted at Tirupur. It is obvious that such a clause will not govern a case where the claim is more than Rs. 5,000. In regard to these cases it must be held that there is no provision in the contract stipulating as to in which of the forums a suit has got to be instituted. We are therefore of the opinion that there is no operative or valid clause ousting the jurisdiction of the Madras Court and vesting it in the Court at Coimbatore. It must be held that the suits have been properly instituted in the Madras Court. The appeals are therefore allowed. The lower Court will restore the suits to its file and dispose the other issues in the case. The appellants will be entitled to costs in both the cases.

R.M. *Appeals allowed.*

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1. (1944) 49 C.W.N. 123. 2. (1954) 1 M.L.J. 434.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

C. Gnanasundara Nayagar .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (*XI of* 1922), *section* 33-*A* (2), *proviso* 2, *clause* (3)—*Applicability and scope—Claim to relief not raised in assessment proceedings or in appeal to Assistant Commissioner or even in appeal to Tribunal—Application for revision under section* 33-*A* (2) *claiming such relief—Competency—Power of Commissioner to revise.*

Interpretation of Statutes—Analogy—If can be resorted to—Acts not in pari materia—*Effect.*

Where an order has been made the subject of an appeal to the Appellate Tribunal, clause (*e*) of the second proviso to section 33-A(2) of the Income-tax Act comes into play and bars the jurisdiction of the Commissioner to revise that order. The fact that the relief claimed in the application preferred under section 33-A(2) was not the subject-matter of the appeal to the Tribunal would not alter the position that the order of assessment was the subject of the appeal. Even if only a portion of the order of assessment is the subject of the appeal to the Tribunal, the same result would follow, because the assessee could claim the relief in the assessment proceedings, in the appeal to the Assistant Commissioner or at least in the appeal preferred to the Tribunal, but omitted to do so.

Where the order appealed against is the order of assessment, the word " order " in clause (*a*) of the proviso to section 33-A(2), obviously refers to the order of assessment and not to the relief claimed in the appeal. The possibility of an appeal is enough to bar the assumption of revisional jurisdiction, while it is the pendency of an appeal before the Assistant Commissioner that bars the revisional jurisdiction under clause (*b*) of the proviso.

An order of assessment cannot be revised by the Commissioner, if an appeal has been preferred against the order to the Tribunal; the position is not affected by the scope of the appeal preferred to the Tribunal, whether it is restricted by the assessee of his own choice or whether it is restricted by the Tribunal.

Analogy is not a permissible aid to construction, when the statutory provisions are not in *pari materia.*

Petition under Article 227 of the Constitution of India praying the High Court to revise the Order of the Commissioner of Income-tax, Madras, dated 28th September, 1955 and made in C.T.R. No. 420 of 1954 and C.T.R. No. 122 of 1955 respectively.

S. Swaminathan and *K. Ramagopal,* for Petitioner.

C. S. Rama Rao Sahib, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—When the petitioner was assessed to income-tax for the assessment years 1951-52 and 1952-53 the rental income from two of his houses 9/2 and 9/3, Mosque Street, Kodambakkam, was included in his return by the assessee himself, and he was taxed on that income, also, Rs. 3,500 in the first and Rs. 3,930 in the second year. Those assessments were completed by the Income-tax Officer on 30th November, 1953. Neither then nor at the stage of the appeals the petitioner preferred successively to the Assistant Commissioner and to the Tribunal against the orders of assessment, did the petitioner assessee claim that he was entitled to deduct the rent from these two houses under section 4 (3) (xii) of the Income-tax Act. The Assistant Commissioner disposed of the appeals on 20th November, 1954. The further appeals preferred by the assessee on 26th January, 1955 were disposed of by the Tribunal on 9th May, 1955. It is not necessary to examine the scope of the reliefs asked for by the petitioner in those appeals. It is enough to note that the petitioner did not prefer any claim based on section 4 (3) (xii) of the Act, and such a claim was not the subject-matter of any of these appeals.

On 10th December, 1954, that is, after the disposal of the appeals by the Assistant Commissioner and before the petitioner preferred appeals to the Tribunal against the orders of the Assistant Commissioner, the petitioner applied to the Income-tax Officer and to the Commissioner of Income-tax for relief under section 4 (3)

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*C.R.P. Nos. 1828 of 1957 and 62 of 1958.

15th September, 1960.
(24th Bhadra, 1882, Saka).

(xii). The claim of the petitioner was that the construction of the two houses in question was commenced in April, 1949 and completed by 31st March, 1950, which was within the statutory limits prescribed by section 4 (3) (xii). The Income-tax Officer could not revise his orders of assessment, and we need not concern ourselves further with the application preferred to him by the petitioner. In the application preferred simultaneously to the Commissioner, the petitioner invoked the jurisdiction vested in the Commissioner by section 33-A (2). The Commissioner called for reports from his subordinates, and eventually on 28th September, 1955 he dismissed the petitioner's applications. The relevant portion of his order ran :

"Section 4 (3) (xii) of the Act is clear that the income can be excluded for a period of 2 years from the date of completion of the building. The crucial date is the date of completion. In this case, no evidence has been adduced as to the exact date of completion of the buildings."

The petitioner applied under Article 227 of the Constitution to revise the orders of the Commissioner dated 28th September, 1955. C.R.P. No. 1828 of 1957 related to the claim with reference to the assessment year 1951-53, and C.R.P. No. 62 of 1958 related to the next year.

The contents of the reports of the subordinate officers which were submitted to the Commissioner before he dismissed the petitioner's application on 28th September, 1955, were obviously not disclosed to the petitioner. The finding of the Commissioner was that the petitioner had adduced no evidence to prove the date on which the construction of the two houses had been completed. Learned counsel for the Department conceded after a reference to the records that he produced, that the view of the Commissioner that there was no evidence was erroneous. There was material disclosed in the reports of the subordinate officers which fully supported the claim of the petitioner, which material and which reports the Commissioner really failed to consider. Had the matter rested there, he would have had no difficulty in setting aside the orders of the Commissioner, and in directing him to dispose of the applications of the petitioner dated 10th December, 1954 afresh and in accordance with law.

Learned counsel for the Department contended that a remand of the proceedings to the Commissioner was not called for, because, the Commissioner had no jurisdiction, in the circumstances of this case, to grant the relief claimed by the petitioner, which necessarily involved a revision of the orders of assessment. Those assessments became final when the Tribunal disposed of the appeals on 9th May, 1955. Learned counsel urged that clause (*c*) of the proviso to section 33-A (2) barred the assumption and exercise of any revisional jurisdiction by the Commissioner to revise the orders of assessment. It is true that that was not a ground on which the Commissioner rejected the application preferred to him by the petitioner. It is equally true that the only ground on which the Commissioner rejected the application does not bear any scrutiny. None the less, we have to uphold the contention of the learned counsel for the Department, that the petitioner misconceived his remedy when he invoked the revisional jurisdiction of the Commissioner under section 33-A (2).

Section 33-A (2) ran :

"(2) The Commissioner may on application by an assessee for revision of an order under this Act passed by any authority subordinate to the Commissioner, made within one year from the date of the order (or within such further period as the Commissioner may think fit to allow on being satisfied that the assessee was prevented by sufficient cause from making the application within that period call for the record of the proceeding in which such order was passed, and on receipt of the record may make such inquiry or cause such inquiry to be made, and, subject to the provisions of this Act, may, pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit:

Provided that the Commissioner shall not revise any order under this sub-section if—

(*a*) Where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made, the time within which such appeal may be made has not expired, or, in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of appeal, or

(*b*) where an appeal against the order has been made to the Appellate Assistant Commissioner the appeal is pending before the Appellate Assistant Commissioner, or

(*c*) the order has been made the subject of an appeal to the Appellate Tribunal :

Provided further that an order by the Commissioner declining to interefere shall be deemed no to be an order prejudicial to the assessee.

Explanation :—For the purposes of sub-sections (1) and (2) the Appellate Assistant Commissioner shall be deemed to be an authority subordinate to the Commissioner".

We shall advert again to the factual position in this case. The petitioner did not claim either in the assessment proceedings before the Income-tax Officer or in the appeals against the assessment orders that the petitioner was entitled to the relief for which section 4(3) (xii) provided. Such a claim was not the subject-matter of the appeal to the Tribunal, though the appeals were preferred to the Tribunal only after the petitioner realised that he had omitted to claim the relief in the assessment proceedings. The applications under section 33-A (2) were preferred on 10th December, 1954, and the appeals to the Tribunal were preferred only after that on 26th January, 1955. Still the position was that the petitioner asked only the Commissioner to revise the orders of assessment in each of the two years. He could have asked for the same relief in the appeals that he subsequently preferred to the Tribunal, but he did not.

Learned counsel for the Department was well-founded in his contention, that where an order has been made the subject of an appeal to the Tribunal, clause (*c*) of the second proviso to section 33-A (2) comes into play and bars the jurisdiction of the Commissioner to revise that order. Learned counsel for the petitioner pointed out that the relief claimed by the petitioner in the applications preferred under section 33-A (2) was not the subject-matter of the appeals the assessee prefered to the Tribunal. The Tribunal could not and did not investigate the claim. It could not and did not adjudge the claim. It is needless to examine in any detail the decided cases cited by the petitioner which certainly supported his claim, that the Tribunal would have had no jurisdiction, in the circumstances of this case, to grant a relief not claimed in the appeals, the relief claimed by the assessee independently of the appeals in the applications he preferred to the Commissioner under section 33-A. (2). That, however, is not enough to exclude the petitioner's claim preferred to the Commissioner from the scope of the ban imposed by clause (*c*) of the proviso to section 33-A (2). That ban applied where the order, the revision of which the assessee seeks under section 33-A (2) is made the subject of appeal to the Tribunal. There is no dispute about the factual position, that the order the Commissioner was asked to revise was the order of assessment, the order of the Income-tax Officer in each of the two years. Was that order of assessment the subject of an appeal to the Tribunal within the meaning of clause (*c*) of the proviso, is the question. It was. That the relief claimed in the applications preferred under section 33-A (2) was not the subject-matter of the appeal to the Tribunal does not alter the position, that the order of assessment was the subject of the appeal. To put it differently, the fact that the jurisdiction of the Tribunal was limited to the disposal of the claims preferred in the appeal, did not alter the position, that the order of assessment was the subject of the appeal. Even if only a portion of an order of assessment is the subject of the appeal to the Tribunal, still the position is that the subject of the appeal to the Tribunal is the order of assessment. To accept the plea of the learned counsel for the petitioner, that the appeals the petitioner preferred to the Tribunal did not prevent the Commissioner from exercising the revisional jurisdiction vested in him by section 33-A (2), we have to construe the word " order " in clause (*c*) of the proviso, as the " relief claimed " and to read clause (*c*) as if it ran :

"provided that the Commissioner shall not revise any order under this sub-section if the relief claimed has been made the subject of an appeal to the Appellate Tribunal".

Such an interpretation is not permissible. The scheme underlying the proviso to section 33-A (2) bars such a narrow interpretation being placed on the word " order " in clause (*c*) alone of the proviso.

In the present case it should be obvious that the petitioner could have claimed the benefit under section 4(3) (xii) in the assessment proceedings before the Income-tax Officer. Even had he failed to ask for it at that stage, he could have asked for it when he appealed to the Assistant Commissioner. He could have claimed the relief even when he appealed to the Tribunal. He could have made not only the order of assessment but also the specific claim for relief based on section 4 (3) (xii) the subject of the appeal to the Tribunal.

Where the order appealed against is the order of assessment the word " order " in clause (*a*) of the proviso to section 33-A (2) obviously refers to the order of assessment and not to the relief claimed in the appeal, because at the stage what would be factually asked for in the appeal would not be known. The possibility of an appeal is enough to bar the assumption of revisional jurisdiction. It is the pendency of the appeal before the Assistant Commissioner that bars such revisional jurisdiction under clause (*b*) of the proviso. It should be remembered that the scope of the appellate jurisdiction of the Assistant Commissioner is much wider than that of the Tribunal. With reference to the Assistant Commissioner and the Commissioner, the Act does not permit concurrent remedies, appellate and revisional, with reference to any of the reliefs an assessee could claim with reference to an order of assessment. That is the position, even though the Assistant Commissioner is a subordinate of the Commissioner or is deemed to be the Subordinate of the Commissioner for the purposes of section 33-A (2). But then the Commissioner can subsequently revise the orders of the Assistant Commissioner. The Commissioner, however, has no jurisdiction to revise the order of the Tribunal. Therefore, under clause (*c*) of the proviso, an appeal being preferred to the Tribunal is enough to bar the exercise of revisional jurisdiction. If no appeal has been preferred to the Tribunal but there is still time to prefer the appeal, clause (*a*) comes into play and bars the revisional jurisdiction. If an appeal is preferred, clause (*c*) comes into play and bars the jurisdiction to revise the order appealed against, the whole or any portion of that order. The finality of an assessment which flows from the order of a Tribunal cannot obviously be disturbed by the Commissioner in the exercise of his revisional jurisdiction under section 33-A (2). Consistent with the scheme of the proviso to section 33-A (2), that revision and appeal are not concurrent remedies open to an assessee ; clauses (*a*) and (*c*) bar the revisional jurisdiction, the first when an appeal is open to the Tribunal, and the second, when an appeal has been preferred to the Tribunal. Running through the entire scheme is the basic concept of the unity of an order of assessment for purposes of appeal or revision. The position is much the same as in the case of assessments to sales tax under the Madras General Sales Tax Act, which was explained by the Divisional Bench of this Court in *The State of Madras* v. *The India Coffee Board*[1]. We must, however, make it clear that we are not relying on that decision to construe the meaning of the expression ' order ' in clauses (*c*) of the proviso to section 33-A(2) of the Income-tax Act. Analogy is not a permissible aid to construction, where the statutory provisions are not even *in pari materia.*

Learned counsel for the petitioner referred to the provisions of Order 47, rule 1, Code of Civil Procedure, and to the decisions thereon *Behari Lal* v. *N.M. Gobardhan Lal*[2], and *Savitramma* v. *Satyanarayanamurthi*[3]. The statutory provisions for a review under Order 47, rule 1, Code of Civil Procedure, are not *in pari materia* with the provisions of section 33-A(2), which provide for a revisional jurisdiction. Not only the assumption of the revisional jurisdiction but also its exercise are conditioned by clause (*c*) of the proviso to section 33-A(2). An order of assessment cannot be revised by the Commissioner, if an appeal has been preferred against that order to the Tribunal. That remains unaffected by the scope of the appeal preferred to the Tribunal, whether it is restricted by the assessee of his own choice or whether it is restricted by the Tribunal. The relief permissible or granted in the appeal to the Tribunal can have no bearing in determining the scope of the statutory expression " order " in clause (*c*) so long as it is the order of assessment that has been appealed against.

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1. (1960) 1 M.L.J. 376 : I.L.R. (1960) Mad. 245 : 11 S.T.C. 1.
2. A.I.R. 1948 All. 353.
3. (1959) 2. An.W.R. 541.

The grant of the relief asked for by the petitioner was beyond the scope of the revisional jurisdiction of the Commissioner that the petitioner invoked in this case. If the petitions are liable to be dismissed on that ground, the orders of the Commissioner, dated 28th September, 1955, cannot be set aside, even though the Commissioner proceeded on an erroneous basis in dismissing the petitions.

The petitions are dismissed. There will, however, be no order as to costs.

P.R.N. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

K. M. Goel, Proprietor, Bombay Anand Bhavan .. *Petitioner**

v.

The State of Madras, represented by the Deputy Commercial Tax Officer, Vellore II, North Arcot District .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *Proviso to section* 3 (1) *of the Act as amended by section* 3 *of Act (XV of* 1956)—*Effect—If offends against Article* 14 *of the Constitution of India* (1950) *and therefore unconstitutional—Rule of* " ejusdem generis "—*Applicability.*

The specific words " hotel, boarding house or restaurant or stall" in the Proviso to section 3 (1) as amended by Madras Act (XV of 1956) are not so widely different in character in so far as the immediate consumability of the articles that are sold in these places is concerned, that one can say that these places differ so greatly from each other that a common feature does not exist. This seems to be a proper case where the " *ejusdem generis* " principle is necessarily and forcibly attracted. On the principles laid down in *Krishna Iyer* v. *State of Madras*, (1956) 2 M.L.J. 179 : I.L.R. (1956) Mad. 1368 : 7 S.T.C. 346, it follows that the taint of unconstitutionality has not been removed by the Amendment of 1956. The apparent discrimination which results in one class of such dealers being singled out for levy of tax at a higher rate, has not been explained by any classification with a reasonable basis, having a just and reasonable relation to the object of the Act.

Krishna Iyer v. *State of Madras*, (1956) 2 M.L.J. 179 : I.L.R. (1956) Mad. 1368 : 7 S.T.C. 346 ; *Mysore Sitaramayya* v. *Assistant Sales Tax Officer, Banglalore City*, (1957) 8 S.T.C. 611, followed.

Kadiyala Chandrayya v. *State of Andhra*, (1959) 1 An. W.R. 18 : 8 S.T.C. 33, dissented from.

Petition under section 12-B (1) of the Madras General Sales Tax Act, 1939, praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 29th April, 1958 and made in T.A. No. 82 of 1958.

K. Srinivasan, D. S. Meenakhisundaram and *A. Devanathan*, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and *G. Ramanujam* for the Government Pleader (*A. Alagiriswami*), for State.

The Judgment of the Court was delivered by

Srinivasan, J.—By section 2 of the Madras Act (XV of 1949), section 3 (1), the charging section of the Madras General Sales Tax Act, 1939, was amended by the addition of a Proviso in these terms :

" Provided that if and to the extent to which such turnover relates to articles of food and drink sold in a hotel, boarding house or restautrant, the tax shall be calculated at the rate of 4½ pies for every rupee if the turnover relating to these articles is not less than Rs. 25,000."

The constitutionality of this Proviso was challenged in *A. R. Krishna Iyer* v. *State of Madras*[1]. It was contended therein that the impugned Proviso offended against Article 14 of the Constitution. This Court upheld the contention holding :

" In our opinion, the distinction between two classes of dealers in articles of food and drink with an annual turnover of Rs. 25,000 and more, *i.e.*, (i) dealers in such articles of food and drink sold in hotels, boarding houses and restaurants ; (ii) dealers in such articles of food and drink sold elsewhere, has no reasonable or just relation to the object of the Act, which is to tax the turnover of the sales of a dealer. The apparent discrimination, which results in one class of such dealers being singled out for levy of tax at a higher rate, has not been explained by any classification with a reasonable basis, having a just and reasonable relation to the object of the Act. We are of opinion that the Proviso to

* T.C. No. 128 of 1958. 14th February, 1961. (25th Magha, 1882, Saka).

1. (1956) 2 M.L.J. 179 : I.L.R. (1956) Mad. 1368 : 7 S.T.C. 346.

section 3 (1) (*b*) of the Act offends Article 14 of the Constitution and is, therefore, void and unenforceable against the first petitioner."

In another decision of this Court in *State of Madras* v. *Kanchilal*[1], Krishnaswami Nayudu, J., sitting singly had to consider whether the turnover of sales of articles of food and drink sold at a sweetmeat stall fell for chargeability within the terms of the Proviso above extracted. The learned Judge held therein that

" The three terms, hotel, boarding house and restaurant, imply that what is supplied as and by way of meals, refreshments and drinks are intended to be consumed at the place where facilities are provided for such consumption, and they do not refer to a stall, where such facilities are not provided, since in a stall sweetmeats are sold for the purpose of being taken away from there and not for the purpose of consuming there. It is not suggested that in the sweetmeat stall in question, provision is made for the purchasers to sit and consume the articles. The inclusion of food and drink in the Proviso further reinforces the view that what is supplied or sold is intended for consumption at the place, since drink at any rate is not ordinarily intended to be taken home. Taking the language of the clause ' articles of food and drink sold in a hotel, boarding house or restaurant ', the irresisitble inference that could be come to is that the articles of food and drink are intended ordinarily to be consumed at the place, which cannot be the case in the case of a street-stall as in the present case...... "

It was accordingly held that the Proviso would not apply to a sweetmeat stall which did not partake of the characteristics of a hotel, boarding house or restaurant.

These decisions were followed by an amendment of the Madras General Sales Tax Act. By section 3 of Act XV of 1956, the Proviso was amended, and in the form in which it stood at the relevant time, it ran thus :

" Provided that if and to the extent to which such turnover relates to articles of food or drink or both sold in a hotel, boarding house, restaurant and stall or any other place, the tax shall be calculated at the rate of 4½ pies for every rupee, if the turnover relating to those articles is not less than Rs. 25,000."

The petitioner in the present case is the proprietor of a sweetmeat stall. The net assessable turnover was determined at Rs. 65,007. Since the amendment of the Proviso by Act XV of 1956 came into effect on 8th October, 1956, the assessing-authority ascertained the quantity of turnover in respect of the periods 1st April, 1956 to 7th October, 1956 and 8th October, 1956 to 31st March, 1957, in so far as it related to sales of articles of food or drink ; he determined them respectively at Rs. 29,971 and Rs. 33, 841. The first of these turnovers was assessed to tax at 3 pies a rupee and the second at 4½ pies. This order of assessment was appealed from and the ground was taken that the selection of prepared foods alone for being subjected to a higher rate of tax distinct from other raw products, which were also articles of food and drink, amounted to discrimination. This contention was not accepted. The appeal failed. When the matter came to the Appellate Tribunal, the Tribunal dismissed the appeal holding that it had no authority to question the validity of the provisions of the Act and the rules.. The matter has now come to this Court by way of a revision under section 12-B (1) of the Act.

In the revision before us, it has been contended that the amendment of the provision by Act XV of 1956 has not had the effect of removing the discriminatory nature of the imposition of tax and that notwithstanding the enlargement of the expression "hotel, boarding house or restaurant" by the addition of "a stall or any other place" the constitutional objection that was raised to the levy at the enhanced rate still continues to prevail. In addition, it is urged that though the object of the amended Proviso was apparently to cover sales of all such articles at whatever place they may be sold, the Department is enforcing the Act to levy the enhanced tax only in respect of sales in hotels, boarding houses, restaurants or stalls. It was further claimed that such articles were sold at other places such as general provision stores, oilmen stores and they were not subject to enhanced levy.

Another ground on which the constitutionality of the amendment is attacked is that the prescription of a minimum turnover of Rs. 25,000 operates as an unreasonable discrimination, placing dealers with a turnover exceeding Rs. 25,000 in an unfavourable position in the conduct of their business as compared with dealers with turnover of less than Rs. 25,000. This arbitrary classification, according to the

1. (1956) 2 M.L.J. 205 : 7 S.T.C. 606.

petitioner, has no reasonable relation to the object intended to be achieved by the Act *viz.*, to tax dealers in articles of food and drink at a higher rate. It may be mentioned that this objection was also raised in *Krishna Iyer* v. *State of Madras*[1], but that question was left open as unnecessary for determinaion in the view the learned Judges took on the other contention advanced in that case.

The first question that we have to determine, is whether in the amended form in which the Proviso has been enacted, it has succeeded in avoiding the taint of unconstitutionality which was held to attach to it as it stood prior to the amendment. The learned counsel for the petitioner contends that the addition of the words 'stall or any other place' to 'hotel, boarding house or restaurant' does not have the effect of bringing to enhanced levy of tax, sales of articles of food and drink wherever they may be sold. The expression 'any other place', according to the learned counsel, should be construed on the principle of *ejusdem generis* ; and if that is so interpreted, it must mean only places of the kind referred to in the particular expressions preceding that phrase. On the other hand, the learned Advocate-General appearing for the State, argues that 'any other place' is a general phrase which must be given its full meaning, and considering that the amendment was effected for the purpose of removing the effect of the decision in *Krishna Iyer* v. *State of Madras*[1], the amplitude of the general phrase should not be restricted in the manner contended for by the petitioner. As it stands, the learned Advocate-General argues, the statute has not left out of its operation any dealer who deals in articles of food or drink or both. The question accordingly reduces itself to a consideration of the proper interpretation of this phrase.

The argument on behalf of the State is that words of limitation should not be read into a statute, if that can be avoided. But this general principle is still subject to other special rules of construction of which the *ejusdem generis* rule is an accepted one. In Craies on 'Statute Law' (5th edition) at page 168, the author observes :

> " This rule of law, generally known as the *ejusdem generis* rule, was thus enunciated by Lord Cambell in *R.* v. *Edmundson*[2]. ' I accede, ' said he, " to the principle laid down in all the cases which have been, cited, that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. It is really a question of the assumed intention of the statute ".

At page 170 :

> " The *ejusdem generis* rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being, what it is, a mere presumption, in the absence of other indications of intention of the Legislature. The modern tendency of the law, it was said, is " to attenuate the application of the rule of *ejusdem generis*". While it is true that these observations indicate that the *ejusdem generis* rule is to be applied with caution, the principle is nevertheless set out as below :
>
> " To invoke the application of the *ejusdem generis* rule, there must be a distinct genus or category The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply. ' Unless you can find a category ', said Farwell, L.J., 'there is no room for the application of the *ejusdem generis* doctrine, ' and where the words are clearly wide in their meaning, they ought not to be qualified on the ground of their association with other words."

Relying upon some of these observations, the learned Advocate-General argues that the words preceding the general phrase 'any other place' do not indicate the existence of any common feature, and that in the absence of such a feature, the *ejusdem generis* rule would not be attracted. We are unable to agree. There is a clearly discernible common denominator running through the expression 'hotel, boarding house or restaurant', which indicates that they are places where articles of food and or drink are prepared and sold, principally, almost conclusively, for consumption on the premises, where provision for such consumption is also made. Even apart from this, the two cases that we have referred to earlier have not placed at least this point beyond the pale of controversy. In dealing with this aspect of the matter, the learned Judges observed in *Krishna Iyer* v. *State of Madras*[1], that the normal expectancy of consumption on the premises of the articles sold is one of the distinct features of sales in a restaurant, an observation which applies equally well to hotels or boarding houses.

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1. (1956) 2 M.L.J. 179 : I.L.R. (1956) Mad. 1368 : 7 S.T.C. 346.
2. (1859) 28 L.J.M.C. 213, 215.

In *State of Madras* v. *Kanchilal*[1], also, this feature was prominently portrayed as differentiating it from a stall. It is clear therefore that in the case of the particular expressions preceding the general one, the intention of the Legislature was to deal with places where prepared articles of food and drink were sold for ready and immediate sale and consumption, whether they were consumed on the spot or not. Articles of food and drink sold at such places do not normally keep for a long time, articles for example tinned foods. It is impossible therefore, to accept the contention of the learned Advocate-General that there is no category, a distinct category, indicated by these expressions. It seems to me, therefore, that these specific words 'hotel, boarding house or restaurant or stall' are not so widely different in character, in so far as the immediate consumability of the articles that are sold in these places is concerned, that one can say that these places differ so greatly from each other that a common feature does not exist. This seems to us to be a proper case where the *ejusdem generis* principle is necessarily and forcibly attracted.

The further argument on behalf of the State is that if the *ejusdem generis* rule is only to serve as a guide or clue to the intention of the Legislature, consistent with the principle that the words of a statute should not be restrictively construed, we should hold that the intention of the Legislature was to bring within the net of taxation all places where articles of food and drink are sold. It seems to us however that it is one thing to refer to the intention of the Legislature and quite a different one to conclude whether that apparent intention has been really given effect to by the words and expressions employed by the Legislature. We are clearly of opinion that in the context in which the expression 'any other place' is found, even if the Legislature can be presumed to have intended that all places where articles of food and/or drink are sold were to be brought within the ambit of the higher rate of tax, they have failed to achieve that object.

We are accordingly left in the same position as when the decision of this Court in *Krishna Iyer* v. *State of Madras*[2], was rendered. On the principles laid down in that decision, it follows that the taint of unconstitutionality has not been removed by the amendment of 1956.

The learned Advocate-General has invited our attention to the unreported decision in Tax Case No. 164 of 1958, where the learned Judges dealt with this Proviso from a different angle. That was a case where a manufacturer of aerated waters supplied quantities of soda water bottles to different retail customers. The learned Chief Justice said :

> " In our opinion, such a sale cannot be deemed to be a sale of drink as such. No doubt, the words 'as such' are not contained in the Proviso, but the meaning of the Proviso is obviously that it is only when there is a sale of articles of food or articles of drink or both are sold that tax is leviable...... We cannot agree with the learned Additional Government Pleader that the addition of the words 'or any other place' by the recent amendment placed a totally different connotation on the words food and drink which would have the effect of rendering sales like the sale in question leviable to enhanced tax. It is not necessary for us to decide for the disposal of this case whether the amendment has succeeded in overcoming the difficulty pointed out in *State of Madras* v. *Kanchilal*[1], or the grounds on which the Proviso was struck down in *Krishna Iyer* v. *State of Madras*[2].

It is enough for us to say that this decision did not deal with the aspect of the matter with which we have been called upon to deal.

It has been conceded by the learned Advocate-General that articles of food or drink sold by dealers other than those operating hotels, boarding houses and restaurants have not all been subjected to the higher rate of tax. According to the learned Advocate-General, however, exemption from such higher levy in these cases has been granted by the Government in the exercise of their powers under section 6 (1) of the Act, which is, according to him, a clear indication that but for this exemption such dealers would be subject to the higher rate of levy. Such notifications exempting Co-operative Milk Supply Societies, manufacturers of syrups, squashes and essences or aerated waters, dealers in articles of food such as biscuits, jam, canned fruits, etc., in sealed containers and oilman stores have been brought to our notice. It is not necessary for us to consider whether any of such dealers as those contemplated in these

1. (1956) 2 M.L.J. 205 : 7 S.T.C. 606.
2. (1956) 2 M.L.J. 179 : I.L.R. (1956) Mad. 1368 : 7 S.T.C. 346.

exemption notifications would at all be liable to the higher rate of tax but for these exemptions. These notifications purporting to be in the exercise of powers of the Government granting exemption, whether such exemption was needed or not, do not carry the matter further in the matter of construction of the terms of the statute. If at all, this argument may be of value only for the purpose of establishing that no inequality in the enforcement of the Act is caused by the administration and the provision should not be struck down on that ground.

The learned Advocate-General further argued that the decision in *Krishna Iyer* v. *State of Madras*[1], be reconsidered. In *Kadiyala Chandrayya* v. *State of Andhra*[2], the Andhra Pradesh High Court upheld the validity of the Proviso holding that the classification mentioned in the section was founded on intelligible differentia distinguishing dealers like the asessee (a hotel) from other dealers, and that it had a rational relation to the object sought to be achieved and that, therefore, it was not void as offending against Article 14 of the Constitution. That the Andhra Pradesh High Court came to a conclusion different from the one arrived at by this Court is by itself no ground for reconsideration of *Krishna Iyer* v. *State of Madras*[1]. Learned counsel for the petitioner pointed out that the Madras view has been followed in *Mysore Sitaramayya* v. *Assistant Sales Tax Officer, Bangalore City*[3]. We are unable to agree with the learned Advocate-General that the Madras decision requires reconsideration.

Relying upon *Stewart Dry Goods Co.* v. *Lewis*[4], a decision of the Supreme Court of America, the further contention has been advanced that the differentiation of dealers on the basis of turnover of Rs. 25,000, levying the higher tax on dealers with a turnover of Rs. 25,000 and above, from dealers with a turnover of less than Rs. 25,000 is also unreasonable and has no rational relation to the object of the taxation. This point was left specifically undetermined in *Krishna Iyer* v. *State of Madras*[1]. In the view that we have taken on the other arguments, it is not necessary for us to enter into this question and we do not propose to express any opinion on this contention.

It follows that the amended Proviso offends against Article 14 of the Constitution and has to be declared unconstitutional on that ground. The petition is allowed. The petitioner will be entitled to his costs. Counsel's fee Rs. 100.

K.L.B. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

Sri Lakshmi Talkies, through one of the Partner R. Anantram .. *Appellant**

v.

W.M.S. Tampoe and another .. *Respondents.*

Contract—Advance and deposit—Advance when amounts to a loan—Failure of particular mode of recovery under contract—Right to the return of advance.

Contract—Assignment of a right of composite character, benefits and burden unseverable—Assignee cannot avoid the burden and take the benefit alone—Doctrine of approbate and reprobate.

A entered into an agreement with *B* by which *A* advanced money to *B* and agreed to recoup the amount by exhibiting the film that *B* produced.

Though the expression 'deposit' is used in describing the amounts advanced by *A* it cannot be said that the parties intended the amount as security for due observance of the terms of the contract by *A*. The substance of the transaction and the real intention of the parties should be ascertained without being misguided by the word deposit. The very fact that *A* was entitled to adjust the producer's share of the collection towards the amount paid by *A* from the very commencement of the exhibition of the picture will dispel all idea of the advance being either in the nature of deposit or earnest money for the faithful discharge or performance of the contract.

It depends upon the circumstances of each case and the terms of the contract between the parties whether an advance payment made by one to the other is in the nature of a loan or not. If the advance is repayable it certainly has an element of loan in its composition.

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1. (1956) 2 M.L.J. 179 : I.L.R. (1956) Mad. 1368 : 7 S.T.C. 346.
2. (1957) An. W.R. 18 : 8 S.T.C. 33.
3. A.I.R. 1957 Mys. 63 : 8 S.T.C. 611.
4. 294 U.S. 550 : 79 Law. Ed. 1054.

* Appeal No. 64 of 1957.

24th January, 1961.
(4th Magha, 1882, Saka.)

A had undoubtedly the right to bring about a liquidation of the advance amounts paid in the manner prescribed by the terms of the agreement. But that does not exclude *A*'s right to claim the advance amount if the mode of discharge prescribed under the contract becomes impossible of performance or becomes unavailable by reason of subsequent events.

The advance in the instant case must be deemed to be in the nature of a loan transaction as the payment of the advance amount in various instalments amounted to a debt *in presenti* on the respective dates of such advancement though not re-payable at once but only in future. The conception of '*Delitum in presenti* and *solvendum in future*' is not unknown to law.

The consequence of any breach of contract on the part of *A*, if any, can only expose him to a claim for damages against him by *B*. It cannot take away his right to recover money payable to him.

Where the subject-matter of an assignment is itself of a composite character partly consisting of a benefit and partly of an obligation inextricably mixed up with the benefit and the two are not severable the assignee cannot sift the benefit alone from the obligation and appropriate it to himself avoiding the obligation. This is really the doctrine of 'approbate and reprobate' which holds that if a person chooses to take the benefit conferred under the instrument he should lkikewise discharge the obligation or bear the onus which such instrument imposes.

The benefit of a contract can be assigned but not the burden. The promisor under a contract cannot shift the burden of his obligations to another without a novation.

Case-law discussed.

Appeal against the Decree of the Court of the Subordinate Judge of Madurai, in O.S. No. 86 of 1955.

The Advocate-General (*V. K. Thiruvenkatachari*) and *K. Parasurama Ayyar*, for Appellant.

K. S. Sankara Ayyar, T. A. Raghunathachari, V. Tyagarajan and *R. Narayanan*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No. 86 of 1955 on the file of the Court of the Subordinate Judge of Madurai sued to recover a sum of Rs. 15,869-11-0 from the four defendants in the suit.

The plaintiff is the registered firm of partnership styled as Sri Lakshmi Talkies, owning a cinema theatre at Madurai. The first defendant started on a venture of producing a talkie film called "Nam Kulandhai" at a studio in Madras with an ambitious programme of engaging star artists to act in the film. The first defendant could not find the entire capital necessary for producing the film and had therefore to enter into several contracts with exhibitors and distributors of the film after its production as a means for raising funds. He was also obliged to find a financier to aid him in this venture and the second defendant in the suit was the financier. The plaintiff entered into an agreement for exhibiting the film at its theatre at Madurai with the first defendant on certain terms and conditions, which will be referred to in detail hereinafter. As per such agreement the plaintiff advanced large sums of money to the first defendant. The third defendant in the suit was the agent of the first defendant undertaking distribution rights of the film within certain territorial limits. The fourth defendant was impleaded on the allegation that the third defendant obtained the distribution rights on behalf of the fourth defendant.

After this net work of agreements between the parties, the film, "Nam Kulandhai" was produced and released for exhibition at Madurai in the theatre of the plaintiff on 4th June, 1955. Prior to its release at Madurai it was released at Madras on 27th May, 1955. The hopes and expectations of the producer, the exhibitors and the distributors were belied and the picture was not given an enthusiastic reception by the cinema fans. The plaintiff screened the picture at its theatre for four weeks and found to its dismay that any further run of the picture in its theatre will cause it great financial loss. The net collections made by the plaintiff during the period of its run at its theatre came to Rs. 12,485-5-0 out of which the share payable to the producer as per the terms of the exhibition agreement came to Rs. 7,297-12-9. The plaintiff had advanced a sum of Rs. 23,000 in all to defendants 1 and 2. The plaintiff did not hand over the producer's share of Rs. 7,297-12-9 to the first or the second

defendant and adjusted it towards the amount due to him. The plaintiff handed over the film to the third defendant on 2nd July, 1955 and the third defendant thereafter screened the picture at another talkie house at Madurai called Palani Talkies. According to the plaintiff its screening agreement with the first defendant was put an end to with the consent of the first defendant and the third defendant on 2nd July, 1955 and that the first defendant promised to re-pay the balance due to the plaintiff, after adjustment of the producer's share of the net collections of the film earned at the plaintiff's theatre. The plaintiff therefore claimed the sum of Rs. 15,702-3-3 arrived at by deducting from the advance amount of Rs. 23,000 the producer's share of Rs. 7,297-12-9 from defendants 1 and 2 personally and from all the defendants jointly and severally out of the producer's share of the collections made and to be made by them in the screening of the film. The sum of Rs. 23,000 paid by the plaintiff included a sum of Rs.3,000 paid into the hands of the third defendant for the re-payment of which however defendants 1 and 2 denied any liability. The plaintiff therefore prayed in the alternative that in any event defendants 3 and 4 must make good this sum of Rs. 3,000 personally.

All the defendants resisted the suit and contended that the plaintiff was not entitled to any relief. The first defendant pleaded that under the terms of the exhibition agreement with the plaintiff, the advance made by the plaintiff could only be recouped by him by running the picture and by appropriating the producer's share from and out of the net collections and that the plaintiff having failed to screen the picture, and having thereby committed breach of contract of the terms of the agreement had no cause of action to sue for the recovery of the money. The substance of the plea of the first defendant was that the terms of the agreement between him and the plaintiff operated as a bar to the maintainability of the suit.

The second defendant contended that he was only a financier who helped the first defendant with moneys under the terms of the financing agreement between him and the first defendant, that he was not a party to the contract between the plaintiff and the first defendant and that the plaintiff had no cause of action to sue him. The third and the fourth defendants practically adopted the contentions of the first defendant.

The learned Subordinate Judge of Madurai who tried the suit found that the oral agreement pleaded by the plaintiff terminating the contract with the first defendant by mutual consent of parties was not true, and that the plaintiff was disentitled to recover any sum of money from all or any of the defendants as there was no specific clause in the exhibition agreement entitling the plaintiff to recover any part of the advance made. With regard to the sum of Rs. 3,000 which the third defendant had received and in respect of which defendants 1 and 2 failed to give credit to the plaintiff, the learned Subordinate Judge took the view that it was really an overpayment made by the plaintiff in excess of the obligation undertaken under the exhibition agreement, and that the plaintiff was entitled to recover that amount from the first defendant. Accordingly the plaintiff was granted a decree for recovery of a sum of R. 3,000 against the first defendant with interest at 6 per cent. thereon from 17th January, 1955, the date of receipt of the amount by the third defendant and proportionate costs. The rest of the plaintiff's claim was dismissed with proportionate costs.

This appeal has been preferred by the plaintiff impleading only defendants 1 and 2 as party respondents.. Defendants 3 and 4 are not parties to this appeal. The question that arises for consideration is whether the plaintiff is entitled to any relief against defendants 1 and 2, and if so for what amount.

The agreement between the plaintiff and the first defendant is Exhibit A-1, dated 27th May, 1954. The first defendant is described in that agreemen as ' Producers ' and the plaintiff as ' Exhibitors '. The agreement provided that the plaintiff should run the picture for a minimum of 50 days irrespective of the quantum of collections and should continue to run the picture after 50 days till the

collections fall below Rs. 2,500 net per week. The plaintiff undertook to pay the first defendant 60 per cent. of the net collections for the first two weeks, 55 per cent. for the third week and 50 per cent. for the fourth week and the subsequent weeks throughout the period of the run of the picture in its theatre. The plaintiff agreed to advance a sum of Rs. 15,000 in all, of which a sum of Rs. 5,000 was to be paid on signing the agreement, Rs. 3,000 to be paid on or before 30th June, 1954 and the balance of Rs. 7,000 to be paid one week in advance of the scheduled date of release of the film. The following clause No. 7, provided for the liquidation and adjustment of the amounts advanced by the plaintiff. That runs as follows :—

" That the producers agree that the amount received by them as deposit as per paragraph No. 6 shall be adjusted by the exhibitors from the share amounts payable to the producers from the commencement of the screening of the picture ".

The first defendant further agreed under that agreement that in the event of sale of the entire rights of the picture or transfer of distribution rights over the area including the City of Madurai such sale and transfer shall be subject to the plaintiff's right to screen the picture at its theatre. The first defendant also agreed not to release the picture in any other theatre at Madurai during the period of its first run at Madurai.

The plaintiff paid a sum of Rs. 5,000 to the first defendant, in pursuance of the agreement referred to, as evidenced by the receipt Exhibit A-2, dated 29th May, 1954. A further sum of Rs. 3,000 was paid by the plaintiff to the first defendant on 29th June, 1954, as evidenced by Exhibit A-4. In between these two payments the first defendant entered into an agreement with the third defendant in regard to the distribution rights of the film in the territories of the districts of Madurai, Ramnad and Tirunelveli, and that agreement was Exhibit A-44, dated 30th May, 1954. It may be mentioned that this agreement, Exhibit A-44 between defendants 1 and 3 was subsequently modified as the parties entered into supplementary agreements Exhibit A-45, dated 10th January, 1955 and Exhibit B-4, dated 2nd June, 1955. It is not necessary to refer to the terms of these agreements as they are not material and have no bearing on the question at issue between the parties in this suit.

Though the agreement, Exhibit A-1, provided only for a payment of Rs. 15,000 as advance by the plaintiff to the first defendant it appears that the parties the plaintiff and the first defendant agreed that a further sum of Rs. 5,000 should be paid as advance in the event of the first defendant being able to bring in the two star artistes, N. S. Krishnan and T. A. Mathuram for acting in the film. This oral agreement is referred to in the letters written by the first defendant to the plaintiff, Exhibit A-8, dated 23rd October, 1954, Exhibit A-9 dated 10th November, 1954 and Exhibit A-10, dated 13th November, 1954. The plaintiff implemented that oral agreement also and paid a sum of Rs. 2,000 by cheque on Canara Bank, Madurai, as evidenced by the receipt, Exhibit A-12, dated 29th November, 1954 and another sum of Rs. 3,000 by a draft as evidenced by Exhibit A-13 also of the same date. It is clear therefore that this additional payment of Rs. 5,000 was also of the same nature as the advance of Rs. 15,000 mentioned in Exhibit A-1, and that the terms of Exhibit A-1 would cover this sum of Rs. 5,000 as well.

There was delay in the production of the film. The third defendant wrote to the plaintiff a letter, Exhibit A-17, dated 27th December, 1954, stating that the picture will be complete by January, 1955. On 17th January, 1955, the third defendant got a sum of Rs. 3,000 from the plaintiff by cheque on Canara Bank Ltd. He passed the receipt Exhibit A-19 in which it was recited that the sum of Rs. 3,000 was received by the third defendant towards the deposit account of the film " Nam Kulandhai ". The plaintiff naturally treated this payment of Rs. 3,000 as partial discharge of its obligations undertaken under Exhibit A-1. It must be remembered that the plaintiff had paid to the first defendant a sum of Rs. 13,000 in all when he paid Rs. 3,000 to the third defendant as per Exhibit A-19. The plaintiff had therefore to pay only a balance of Rs. 4,000 before obtaining the positive of the film for being screened at its theatre. The plaintiff wrote Exhibit A-25, dated 22nd May, 1955, to the first defendant who was having his Head Office at Madras enclosing a cheque for Rs. 4,000 on the Canara Bank Ltd., Madurai and requesting to be

forwarded with the print of the picture. The plaintiff stated in that letter that the picture was to be released at its theatre on 27th May, 1955.

The second defendant, the financier, had everything under his control and the first defendant could not therefore do anything without the consent or the approval of the second defendant. The plaintiff was unable to obtain the film for being screened and he therefore sent his representative to Madras to contact defendants 1 and 2 and to negotiate for the delivery of the film. The second defendant failed to acknowledge credit for the sum of Rs. 3,000 which the plaintiff had admittedly paid to the third defendant and insisted upon payment of Rs. 7,000 before the release of the picture. The plaintiff in his anxiety to get the film in respect of which he had already made huge advances had no option but to yield to the demands of the second defendant. The plaintiff obtained a bank draft for Rs. 7,000 on 3rd June, 1955, on the Canara Bank Ltd., Madras, in its own name and endorsed it in favour of the second defendant and handed over the draft to the second defendant's representative one S. P. Ganapathi. This is evidenced by the letter of the third defendant to the second defendant Exhibit B-1 dated 3rd June, 1955. The plaintiff actually screened the picture at its theatre on and from 4th June, 1955.

The plaintiff returned the film to the third defendant on 2nd July, 1955. On behalf of the plaintiff an assistant employed in the firm gave evidence as P.W. 1. He deposed that the first defendant came to Madurai on 27th June, 1955, that the collections were below Rs. 100 per day, that he met the first defendant and informed him of the low collections, and that the first defendant agreed that the screening of the picture may be stopped by the end of the fourth week if there was no improvement in collections. P.W. 1 further deposed that the first defendant directed the film to be handed over at the end of the fourth week to the third defendant, and that the first defendant undertook to pay the balance that may be due to the plaintiff. It is common ground that the third defendant actually took delivery of the film on 2nd July, 1955 and thereafter exhibited it in Palani Talkies at Madurai. The first defendant gave evidence as D.W. 1 and he denied having met P.W. 1 or the managing partner of the plaintiff's firm, Anantaraman, on 27th June, 1955, at Madurai, though he admitted having visited Madurai on that date. His evidence in regard to this matter was as follows :—

"I visited Madurai on 27th June, 1955. I did not meet P.W. 1 or Anantaram on 27th June, 1955, at Madurai. I did not agree with them to stop the running of the picture at the end of the fourth week. The third defendant intimated me a few days after the return of the film that the plaintiff returned the film and that he took it under protest."

He deposed that the third defendant wrote a postcard to him in this connection after taking delivery but no such postcard was produced into Court. He admitted that he did not write to the plaintiff protesting against the unlawful termination of the contract by suddenly handing over the film to the third defendant. He explained his omission in not raising any protest by stating that the third defendant had already protested at the time when he took delivery of the film by his not signing the last day's collection list on 2nd July, 1955. It is true that the third defendant did not sign in the daily collection book on 2nd July, 1955, though he had signed the previous collection lists.

The learned Subordinate Judge seems to think that P.W. 1 admitted in the witness-box that the third defendant refused to sign the daily collection book on 2nd July, 1955. The answer given by P.W. 1 in cross-examination by the third defendant is as follows : "The third defendant did not sign in the daily collection book on 2nd July, 1955. Our clerk handed over the film in the office of the thi d defendant." It may be possible to infer from the evidence on record that the third defendant refused to sign the collection book on 2nd July, 1955, from the fact of his not having signed it on 2nd July, 1955, taken along with the circumstances of his having signed the book on earlier occasions. It must however be noted that the third defendant has discreetly avoided the witness-box. The evidence of the first defendant as to the circumstances under which the third defendant came to be in possession of the film can at best be only in the nature of hearsay. It is not

suggested that there is any collusion between the plaintiff and the third defendant. The written statement filed by the third defendant is in no way less emphatic than that filed by the first defendant in resisting the plaintiff's claim. Defendants 1 and 3 were represented by the same learned counsel during the trial of the suit. From the non-examination of the third defendant as a witness the inference is irresistible that he was unwilling to controvert the evidence given by P.W. 1. We accept the evidence of P.W. 1 which remained uncontradicted, the evidence of the first defendant being hearsay and as such being inadmissible. The plaintiff was, therefore, not in breach of the terms of the agreement, Exhibit A-1 in not screening the picture for the minimum period of 50 days provided for in the agreement. The first defendant took delivery of the film through his agent, the third defendant, from the plaintiff on 2nd July, 1955, possibly in the hope that the run of the picture in another theatre might earn him more money than what the plaintiff was able to do during the run for the first four weeks. The agreement Exhibit A-1 was, therefore, put an end to by consent of parties on 2nd July, 1955, subject to the rights and obligations which had already accrued in the matter.

We shall first discuss the question whether on the above facts the first defendant is liable to return the sum of Rs. 15,869-11-0 claimed by the plaintiff. There is no express provision in Exhibit A-1 entitling the plaintiff to claim back the advance amount. The plaintiff had the right to adjust the producer's share of the collections towards the advances made, so long as the picture was run. If the plaintiff had screened the film strictly in accordance with the terms of Exhibit A-1, that is, screened it for 50 days irrespective of the collections, and thereafter continued it till the collections fell below Rs. 2,500 net per week, and found at the time of ceasing to screen the picture that inspite of the adjustment made there was still a balance due to it by way of refund of advance, it cannot seriously be doubted that the plaintiff will be entitled to claim back that amount. In fact so much is conceded by the learned counsel appearing for the first defendant.

The contention raised on behalf of the first defendant however is that the plaintiff committed a breach of the terms of Exhibit A-1 in abruptly ceasing to run the picture at the end of four weeks, and that the advance made by the plaintiff was in the nature of deposit for security towards the due performance of the contract under Exhibit A-1, and that therefore the plaintiff's claim should fail. Though the expression ' deposit ' is used in Exhibit A-1-in describing the advance amount paid by the plaintiff, and though the receipts Exhibits A-2 and A-4 and other receipts also describe the various amounts received by fir t defendant as deposit, it cannot be said that the parties intended the amount as security for due observance of the terms of the contract by the plaintiff. We have to look at the substance of the transaction, and to ascertain the real intention of the parties in the matter of payment and receipt of the advance amounts and should not be misguided to hold, from the use of the expression ' deposit ' that the plaintiff offered the amount as security for the proper performance of the contract. The very fact that the plaintiff was entitled to adjust the producer's share of the collection towards the amount paid by him from the very commencement of the picture in their theatre will dispel all idea of the advance being either in the nature of deposit or earnest money for the faithful discharge or performance of the contract.

The contention of the first defendant that the absence of any specific provision in Exhibit-A-1 entitling the plaintiff to recover the advance amounts in any contingency and the specific mode of discharge and the repayment of the advance amount by adjustment out of the producer's share of the net collections operate as a bar to the plaintiff's claim cannot be sustained. The plaintiff had undoubtedly the right to bring about a liquidation of the advance amounts paid in the manner prescribed by the terms of the agreement. But that does not exclude the plaintiff's right to claim the advance amount if the mode of discharge prescribed under the agreement becomes impossible of performance or becomes unavailably by reason of subsequent events. The advance amount is certainly repayable be

the first defendant as so much is implicit in the terms of the agreement itself. Earl Jowitt in his Law Dictionary has given the following meaning to the word 'advance' at page 68 : "Money paid before it is due ; a loan". It depends upon the circumstances of each case and the terms of the contract between the parties whether an advance payment made by one to the other is in the nature of a loan or not. If the advance is repayable it certainly has an element of loan in its composition. In a recent decision of this Court reported in *Md. Abdul Kadir Rowther* v. *Muthiah Chettiar*[1], a contract between two distributors of films containing terms similar to those found in Exhibit A-1 came in for consideration. In that case the appellant undertook to exploit a picture called "Vikatayogi" in respect of which the respondent held distributing rights. Under the terms of the agreement between the appellant and the respondent, the appellant was to pay the respondent a sum of Rs. 15,000 as advance and that the appellant was to have rights over the picture by way of distribution for a period of 4½ years. The agreement also enabled the appellant to recover the advance of Rs. 15,000 from the share of the amounts payable to the respondent. After the expiry of the period the appellant found that only a part of the sum of Rs. 15,000 stood discharged or adjusted. There was no provision in the agreement between the parties as to what should happen if the net realisations during the contract period fell short of the sum of Rs. 15,000 The question was whether a promise to pay that amount by the respondent to the appellant could be implied. Ramachandra Iyer, J., who delivered the judgment of the Bench was of the opinion that the advance of Rs. 15,000 cannot be said to be by way of loan but the learned Judge held that it was possible to spell out an implied promise to pay. At page 17 the learned Judge observed as follows :—

> "We have already referred to the intention of the parties as disclosed in Exhibit A-2 that the sum of Rs. 15,000 was to be recovered. Clause 6 of the agreement, in our opinion, was intended to create a right to lien or set off over the 87½% of the collection : which otherwise would have to be paid over to the respondent. It purported to provide only an additional right and cannot be held to exclude an obligation to pay back the advance, or such portion thereof as remained unpaid after the period of the contract was over...... We are, therefore, of the opinion that in the circumstances of the case the maxim (*expressio unis est exclusio alterious*) cannot apply, and that the parties intended to adjust the advance sum of Rs. 15,000 at the end of the contract period, that an obligation to pay the unadjusted portion of the advance amount which remained due at the termination of the contract should be implied on the terms of the document, and that the appellant would be entitled to recover the amount due."

Adopting the reasoning of the learned Judge with respect, we are of opinion that a promise to repay the advance amount in full or in part, according to the circumstances, by the first defendant to the plaintiff can well be implied, as such an implied promise is implicit in the terms of the agreement. We are also of opinion that the advance of Rs. 15,000 must be deemed to be in the nature of a loan transaction as the payment of the advance amount in various instalments amounted to a debt *in presenti* on the respective dates of such advancement though not repayable at once but only in future. The conception "*Delitum in presenti and solvendum in futuro*" is not unknown to law.

We have held that the plaintiff did not commit a breach of the terms of Exhibit A-1 in returning the film on 2nd July, 1955 as that was done by mutual consent and agreement between the parties in rescission of the contract between them. The contention on behalf of the first defendant that the plaintiff is under any disability to sue for the recovery of the money by reason of breach of contract on their part must therefore fail. But we are unable to see how, even if it can be said that the plaintiff was in breach, that would in any way be fatal to the maintainability of the suit claim. The consequence of any breach of contract on the part of the plaintiff, if any, can only expose the partners to a claim for recovery of damages against them by the first defendant. It cannot take away their right to recover money repayable to them. It may be that the first defendant might put forward a plea of set-off or of counter-claim against the plaintiff for damages for alleged breach of contract. If the first defendant cannot pursue a counter-claim in this suit, it was open to him to have filed a separate suit for recovery of damges.

1. (1960) 2 M.L.J. 13.

But under no circumstances can the first defendant resist the claim of the plaintiff for recovery of the advance amount by pleading a breach of contract on the part of the plaintiff. It is only necessary to refer to the decision of the Judicial Committee in *Muralidhar Chatterji* v. *International Film Company, Ltd.*[1]. Sir George Rankin delivering the judgment of the Board observed thus at page 224 :

" The fact that a party to a contract is in default affords good reason why he should pay damages, but further exaction is not justified by his default. Where a payment has been made under a contract which has—for whatever reason—become void the duty of restitution would seem to emerge. A cross claim for damages stands upon an independent footing, though it arises out of the same contract and may be set off. "

Again at page 225 :

" On general principles they may set-off such damages as they have sustained, but, the Act requires that they give back whatever they received under the contract."

In our judgment the plaintiff has made out a case for recovery of the suit amount from the first defendant as the cause of action of the plaintiff against the first defendant is well founded in law and on facts.

The next question that has to be considered is whether the second defendant is answerable to the plaintiff's claim. The agreement between the second and the first defendant is Exhibit B-8, dated 28th October, 1954. The first defendant is described as the borrower and the second defendant as the financier therein. Under the terms of that agreement the second defendant undertook to finance the further production of the picture, which was incomplete at that time by lending a sum of Rs. 2,05,000. It is not neceesary to refer to all the terms and conditions therein embodied. Clause 21 is the material clause which needs to be referred to. It is as follows :—

"Without prejudice to the generality of the foregoing, in respect of the agreements deposited with the financiers, dated 26th September, 1954, 30th May, 1954, 11th March, 1953, 8th February, 1954, 9th August, 1954 and 29th September, 1954 and entered into by the borrower with Messrs. Prema Films, R. Krishnamurthi, Messrs. Murugan Talkies Ltd., K. S. Gopalakrishnan, Proprietor of O.M. Films, E. M. Gopalakrishna Kone and Subbu and Co., respectively the borrower doth hereby constitute and appoint the financiers as an agent entitled to enforce the performance of the terms of the said agreements with irrevocable authorisation to receive monies on account and on behalf of the borrower from the respective parties."

R. Krishnamurthy therein referred to is the third defendant in the suit. The agreement, dated 30th May, 1954 referred to is Exhibit A-44 in the case. There is no reference to Exhibit A-1 as such in that agreement. Exhibit A-44 refers to Exhibit A-1 and provides that the third defendant should hand over to the first defendant all deposits received from the exhibitors including the deposit received from the plaintiff. We have already mentioned that between the first and the third defendant there were two agreements subsequent to 30th May, 1954, Exhibits A-45 and B-4. Exhibit A-45 and Exhibit B-4 contain an endorsement made on behalf of the second defendant as follows : " Agreed and confirmed sans recourse."

The learned Advocate-General appearing on behalf of the plaintiff contended that by Exhibit B-8 the first defendant assigned his rights under Exhibit A-1 in favour of the second defendant inasmuch as the second defendant was appointed irrevocably as the agent on behalf of the first defendant to enforce the terms of the agreements referred to, one of which was Exhibit A-44. We shall assume for the purpose of this argument that the second defendant was constituted as agent of the first defendant to collect moneys due to the first defendant from the plaintiff under Exhibit A-1. We shall also assume that such agency was an agency coupled with interest as the second defendant as financier had advanced large sums of moneys and was entitled to recoup the advances so made by collecting the monies due to his debtor, the first defendant, from third parties. Exhibit B-8 can, if at all, be construed as an assignment of *a chose in action* enabling the second defendant, the assignee, to collect the debt due to the assignor from third parties. The learned Advocate-General relied upon the maxim, ' He who derives the advantage ought to sustain

1. (1943) 2 M.L.J. 369 : L.R. 70 I.A. 35 : I.L.R. (1943) 2 Cal. 213 (P.C.).

the burden' (*qui sentit commodum sentire debet et onus*) and quoted the following observation at page 484 in Broom's Legal Maxims :

"Again, it is a very general and comprehensive rule, which falls within the scope of the maxim under consideration, that the assignee of a chose in action takes it subject to all the equities to which it was liable in the hands of the assignor. If, moreover, a person accepts anything which he knows to be subject to a duty or charge, it may be rational to conclude that he means to take such duty or charge upon himself, and the law may imply a promise to perform that he has so taken upon himself."

The last portion of this quotation is taken, as indicated by the footnote, from a passage in the judgment of Justice Bosanquet in *Lucas and others* v. *Nockells*[1], quoting from *Abbot on Shipping*, p. 286, 5th Ed. Legal maxims serve to focus attention on the first principles of law, but being only of general application have to be applied with caution to the particular facts and circumstances arising in each case. As Lopes, L.J., observed in *Colquhoun* v. *Brooks*[2], in dealing with another legal maxim, maxims may often be a valuable servant but a dangerous master to abide by in all circumstances.

The learned Advocate-General contended that the second defendant as an assignee of a chose in action, which he became by virtue of the operation of Exhibit B-8, can only have taken the assignment subject to the equities which the debtor might have against the first defendant, the assignor. We shall now refer to the decisions relied upon by the learned Advocate-General.

The first decision is the one in *The Government of Newfoundland* v. *The Newfoundland Railway Company*[3]. In that case by a contract in the year 1881 the company, the plaintiff in the suit, covenanted to complete a railway in five years and thereafter to maintain and continuously operate the same. In consideration of this the Government of Newfoundland covenanted to pay the company an annual subsidy for 35 years ; such subsidy to attach in proportionate parts and form part of the assets of the company. The company completed a portion of the line and received from the Government on the completion of each five mile section certain half yearly payments in respect of the proportionate part of the subsidy. Thereafter the contract was broken by the company and the Governmed refused further payments. The company had assigned its right in respect of a portion of the construction of the railway line. A suit was filed by the company and its assignees to enforce the terms of the agreement. One of the questions that arose for consideration was whether the Government was entitled to set-off as against the company's suit claim, a counter-claim for unliquidated damages for the company's breach of the contract, in not completing the line. The Judicial Committee held that the Government were so entitled. It was also held that the set-off claimed by the Government can be availed of against the assignee of the company as the claim and counter-claim had their origin in the same portion of the same contract. At page 212 Lord Hobhouse observed thus :

"The two claims under consideration have their ori gin in the same portion of the same contract where the obligations which gave rise to them are inter-wined in the closest manner. The claim of the Government does not arise from any fresh transaction freely entered into by it after notice of assignment by the company. It was utterly powerless to prevent the company from inflicting injury on it by breaking the contract. It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counter-claim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their Lordships have no hesitation in saying that in this contract the claims for subsidy and for non-construction ought to be set against one another."

The assignee in the case before the Judicial Committee was an assignee of a part of the contract. That is a feature which has got to be noticed and that feature loomed large before the learned Law Lords in arriving at the decision.

The next decision referred to by the learned Advocate-General was the one in *Lawrence* v. *Hayes*[4]. In that case the owner of a business sold it to the defendant

1. (1833) 6 E.R. 980 : 1 Clark & Finnely's Reports 438 at 457.
2. L.R. (1888) 21 Q.B.D. 52.
3. L.R. (1888) 13 A.C. 199.
4. L.R. (1927) 2 K.B. 3.

on terms of payment by instalments, and then assigned the benefit of the agreement to the plaintiff. Before notice of the assignment was given to the defendant, the latter obtained judgment for a sum of money against the assignor as damages for breach of warranty on the above sale. The plaintiff the assignee, sued the defendant for payment of instalments due under the assigned agreement, and the defendant claimed to set-off the amount covered by the judgment which he had obtained against the assignor. The plaintiff contended that the defendant's right to damages in respect of the breach of warranty had merged in the judgment, and that the latter could not be set-off against the claim. It was held that the set-off was valid. The principle of the decision in *The Government of Newfoundland* v. *The Newfoundland Railway Company*[1], was referred to and followed with approval.

The principle of law which emerges from the above citations is this. Where the subject-matter of an assignment is itself of a composite character, partly consisting of a benefit and partly of an obligation inextricably mixed up with the benefit, and the two are not severable the assignee cannot sift the benefit alone from the obligation and appropriate it to himself avoiding the obligation. This is really the doctrine of 'approbate and reprobate' which holds that if a person chooses to take the benefit conferred under an instrument he should likewise discharge the obligation or bear the ones which such instrument imposes. Chitty in his Book on Contracts, 20th Edition, page 446, sums up the legal position governing assignments under section 136 of the Law of Property Act, 1925, as follows :—

> "Assignments under the statute are expressly stated to be subject to any equities having priority over the rights thus transferred. Thus where a claim arises out of the contract under which the debt arises and the claim affects the value or amount of the contract which one of the parties has purported to assign for value, then if the assignee subsequently sues, the other party to the contract may set up that claim by way of defence against the assignee as cancelling or diminishing the amount to which the assignee asserts his rights under the assignment. It must, however, be a claim which has accrued before notice of assignment and which arises out of the contract itself, as for example, calls on shares set-off against money due on debentures in a company."

Cheshire in his Law of Contracts, 5th Edition, sets out the legal position thus at page 428 :

> "Even unliquidated damages may by way of counter-claim be set-off by the debtor against the assignee, provided that they flow out of and are inseparably connected with the contract which has created the subject-matter of the assignment. Thus if a builder assigns to the plaintiff money that will be due from the defendant upon completion of a building, the defendant may set-off against the claim of the plaintiff any damage caused to him by the delay or by the defective work of the builder. But nothing in the nature of a personal claim against the assignor can be used to defeat the assignee."

It is well settled that an assignee takes subject to all the equities that the debtor may plead or could have pleaded against the assignor. The equities that the debtor may plead against the assignee as a defence to the assignee's action against him must however be the equities that have matured at the time of notice to the debtor of the assignment. In *Mangles* v. *Dixon*[2], Lord St. Leonards observed thus :

> "The authorities upon this subject, as to liabilities, show that if a man does take an assignment of a chose in action he must take his chance as to the exact position in which the party giving it stands."

In *Roxburghe* v. *Cox*[3], an army officer assigned to the Duke of Roxborough the money that would accrue to him from the sale of his commission. This money amounting to £3000 was paid on December 6th to the credit of his account with his bankers, Messrs. Cox. On that date his account was overdrawn to the extent of £647. On December 19th, the Duke gave notice of the assignment to Messrs. Cox. It was held that Messrs. Cox could set-off the debt of £647 against the right of the Duke to the sum of £3000. James, L.J., observed thus :

> "Now an assignee of a chose in action......takes subject to all rights of set-off and other defences which were available to the assignor, subject only to this exception that after notice of an assignment of *a chose in action* the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception."

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1. L.R. (1888) 13 A.C. 199.
2. (1852) 3 H.L. 702 at 735.
3. (1880) 17 Ch. D. 520.

Under the Indian Law section 130 of the Transfer of Property Act provides the rule for transfer of actionable claims. The Proviso to clause (1) of that section is as follows :—

> " Provided that every dealing with the debt or other actionable claim by the debt or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer."

This proviso in effect restricts the rights of the assignee as being subject to the equities of the debtor against the assignor.

Exhibit B-8, the agreement between the first and the second defendant which is relied upon by the plaintiff as a deed of assignment in favour of the second defendant of the first defendant's rights under Exhibit A-1 was on 20th October, 1954. On that date the film, "Nam Kulandhai" was still in the stage of production and the plaintiff did not of course acquire any right for repayment of the advance amounts paid by him under Exhibit A-1. By that time only a sum of Rs. 8,000 had been paid by the plaintiff. The approximate date when the plaintiff became aware and was put on notice of the agreement, Exhibit B-8, is important in determining the equities available to the plaintiff as against the second defendant. P.W. 1 deposed that he came to know of the agreement between the first and the second defendant only at the time when he saw Exhibit A-16 which is a copy of the daily Dinamani, dated 26th December, 1954. No doubt P.W. 1 also deposed that on 27th June, 1955 he was not aware that the second defendant had acquired the rights in the film. He admitted that he added the second defendant as a party to this suit by reason of the publication in Exhibit A-16 that the rights in the film were transferred by the first defendant to the second defendant. It seems to us that the plaintiff must have come to know at least on the date of Exhibit A-16 of the interests of the second defendant in the film. Before the date of the publicationin Exhibit A-16 the plaintiff had paid in all a sum of Rs. 13,000 to the first defendant as per the terms of Exhibit A-1. The producer's share of the collection realised by the plaintiff from screening the picture from 4th June, 1955 to 1st July, 1955, namely, the sum of Rs. 7,297-12-9 must be deemed to have been adjusted only towards this sum of Rs. 13,000 as the presumption of law always is that the creditor adjusts all repayments of debt chronologically in accordance with the dates of the incurring of the obligation. It is therefore not possible for the plaintiff to hold the second defendant liable for the entire amount of Rs. 15,869-11-0 claimed in the plaint. The second defendant can if at all be made liable only for the sum of Rs. 13,000 minus the sum of Rs. 7,297-12-9. On the date of Exhibit B-8, or even on the date of Exhibit A-16 the first defendant was not liable to repay to the plaintiff any portion of the advance amount till then received by him. It cannot therefore be said that the second defendant by entering into the financing arrangement as embodied in Exhibit B-8 became the assignee from the first defendant of any future obligation on the part of the first defendant to repay the advance amount to the plaintiff.

We are of opinion that Exhibit B-8 even if it can be said to operate as an assignment in favour of the second defendant of the first defendant's rights under Exhibit A-1 cannot avail the plaintiff to sue the second defendant for recovery of all or any portion of the suit amount. The principle of law that the assignee of a chose in action takes the assignment subject to the equities in favour of the debtor as existing on the date of the notice of the assignment to the debtor can at best only provide a defence to the debtor in an action by the assignee against him for recovery of the money. It is doubtful whether the debtor can in some contingency sue to recover any sum of money from the assignee though such claim may spring out of the equities which he may have had against the assignor.

The benefit of a contract can be assigned but not the burden. The promisor under a contract cannot shift the burden of his obligations to another without a novation. The substitution of one debtor by another debtor without the knowledge

of the creditor may perhaps lead the creditor to seek his remedy against an insolvent debtor. The law therefore does not recognise an assignment of a liability pure and simple without a novation or without a fresh contract between the original parties to the contract and the assignee. The first defendant cannot be said to have assigned by means of Exhibit B-8 his liability of the implied promise to pay the plaintiff arising out of Exhibit A-1.

Sir William Anson in his Law of Contracts, 21st Edition, at page 363 has observed thus :

> " A promisor cannot assign his liabilities under a contract ; or, conversely, a promisee cannot be compelled, by the promisor or by a third party, to accept any but the promisor as the person liable to him on the promise. The rule is based on sense and convenience, for a man is entitled to know to whom he is to look for the satisfaction of his rights under a contract."

There is no plea in this case of a novation by which the contract between the plaintiff and the first defendant under Exhibit A-1 became substituted by a fresh contract between the plaintiff and the second defendant.

In *Jaffer Meher Ali* v. *Budge Budge Jute Mills*[1], on appeal, *Jaffer Meher Ali* v. *Budge Budge Jute Mills*[2], Sale, J., observed thus :

> "The rule as regards the assignablility of contracts in this country is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term *benefit* the benficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby. This rule is however subject to two qualifications ; first, that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfill, and next that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it."

With respect we agree with this observation.

We are unable to uphold the contention of the learned Advocate-General that the second defendant incurred any liability by reason of Exhibit B-8 either on the footing that he was an assignee of a benefit of the first defendant's rights under Exhibit A-1, and that therefore he cannot retain the benefit without becoming burdened with the obligation arising out of Exhibit A-1, or on the footing that he became an agent coupled with interest. On a proper construction of the terms of Exhibit B-8 it must be held that the second defendant was only a financier who lent money to the first defendant for the production of the picture and that the amounts realised by him from the plaintiff only represented adjustments towards the money due to him from the first defendant. Whatever rights the plaintiff may have against the first defendant arising out of the contract, Exhibit A-1, the character of the moneys in the hands of the second defendant was certainly not that of the plaintiff's moneys remaining with the second defendant. In the hands of the second defendant those moneys were nothing but realisations made by the second defendant towards the moneys lent by him to the first defendant. It follows that the decree of the Court below dismissing the suit against the second defendant must stand.

As we have held that the first defendant is liable to the plaintiff for the suit claim, the decree of the Court below will be modified. There will be a decree for the recovery of the sum of Rs. 16,702-3-3 in favour of the plaintiff as prayed for in the plaint against the first defendant with interest thereon at 6 per cent per annum from the date of plaint. The appeal is allowed and the judgment and decree of the Court below are modified accordingly. The parties to this appeal will bear their respective costs both here and in the Court below.

V.S. *Appeal allowed.*

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1. (1906) I.L.R. 33 Cal. 702 at 707. 2. (1906) I.L.R. 34 Cal. 289.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATADRI.

The Secretary, Nanguneri Peace Memorial Co-operative Urban Bank, Ltd., Nanguneri .. *Petitioner**

v.

Alamelu Ammal .. *Respondent.*

Banker and Customer—Acts of Secretary outside scope of employment and authority and in breach of rules and bye-laws—If binding on bank—Principles governing rights of third parties—Master and Servant—Company—Position of Secretary of banking company—Principal and Agent—Fraudulent and forged documents by Secretary or agent in favour of third parties—Validity as against Principal or Master—Rule as to.

A bank or a limited company cannot be held to be answerable to third parties for the fraudulent acts of its servant or officer, such as a Secretary, when the latter is not acting within the scope of his authority and when he is acting in breach of the rules and bye-laws of the bank.

It is a well-established principle of law that strangers are entitled to assume that all things connected in the transactions and pertaining to the internal management of a company have been validly done ; but this has no application to fraudulent and forged instruments. It is equally well-established that a Seretary is a mere servant and has to do what he is told to do and no one can assume that he has any authority to represent anything at all.

If the Secretary is shown to have either express authority to perform certain acts or implied authority by a course of dealing, that is, if he is acting within the scope of his authority, his acts would bind the company, even if done tortiously or fraudulently or even though they enure not for the benefit of the company but for the benefit of the Secretary himself. But when his acts are unauthorised and outside the scope of his employment and authority, and in breach of the rules and bye-laws, they cannot bind the company and the instrument or documents signed and issued by him are simply null and void. These principles are equally applicable whether it be a case of Agency or of Master and Servant.

Ruben v. *Great Fingall Consolidated*, L.R. (1906) A.C. 439; *Kreditbank Cassel* v. *Schenkers, Ltd.*, (1927) All. E.R. 421 ; *South London Greyhound Race Courses Ltd.* v. *Wake*, L.R. (1931) 1 Ch. 498 ; *Mathias* v. *Kilachen Agricultural Co-operative Bank*, (1938) 1 M.L.J. 241 and *Lloyd* v. *Grace, Smith and Co.*, L.R. (1912) A.C. 716, referred to.

Gower's Modern Company Law, page 157 ; Bowstead's Digest of the Law of Agency, Article 82 and Smith's " Law of Master and Servant ".

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Tirunelveli dated 16th March, 1957 and passed in S.C.S. No. 926 of 1956.

R. Ramamurthi Ayyar for Petitioner.

K.S. Champakesa Ayyangar and *S.V. Rama Ayyangar* for Respondent.

The Judgment of the Court was delivered by

Venkatadri, J.—This Civil Revision Petition belongs to the unfortunate class of cases in which the Courts have to decide which of the two innocent parties has to suffer for the fraud of a third party.

The petitioner is a Co-operative Bank doing banking business. The respondent is a lady who had dealings with the bank from the year 1952. She made two fixed deposits with the Bank one for a sum of Rs. 2,300 on 24th January, 1955 and another for a sum of Rs. 550 on 5th April, 1952 for three years, the interest payable being 5 per cent per annum. Two fixed deposit receipts bearing Nos. 1293 and 1192 respectively were issued to her by the Secreatary. As she did not receive interest once in six months as per the rules of the bank, she issued a notice calling upon the bank to pay the interest accrued due on the said two deposits. The petitioner (bank) promptly denied its liability and replied to her letter stating that only a sum of Rs. 1,000 had been deposited under fixed deposit receipt No. 1293. The respondent filed the suit S.C. No.926 of 1956 for a decree directing the bank to pay Rs. 237-8-0 for the interest accrued due on the fixed deposits. The petitioner, who was the defendant in the suit, contended that the fixed deposit receipts No. 1293 for a sum of Rs. 2,300 and No 1192 for a sum of Rs. 550 were not issued by the bank, that there was

*C.R.P. No. 766 of 1957.

16th December, 1960.
(25th Agrahayana, 1882, Saka).

no entry in the account books of the bank either for the alleged deposit of Rs. 2,300 or Rs. 550, that the fixed deposit receipts were never signed by the directors except the Secretary and that the fixed deposit receipts now held by the respondent are bogus ones and not binding on the bank.

The learned District Munsif who tried the suit found that the fixed deposit receipts were not genuine and the Secretary of the Bank committed a forgery by affixing the signatures of the three directors. Nevetheless he came to the conclusion that as the Secretary was authorised to receive the money according to the bye-laws of the bank, the bank was liable to pay the amounts due on the fixed deposit receipts held by the respondent and he accordingly decreed the suit. The bank has filed this revision petition and as an important question is involved in this case, namely, how far a bank is answerable to third parties for the fraudulent acts of its servants or officers, the Civil Revision Petition has come up before a bench for consideration.

Before considering the question of law involved in this case it is necessary to set out the relevant bye-laws framed by the bank. They are :

Bye law 14.—Deposits may at the discretion of Board of Directors be received at any time from members or non-members.

Bye law 15.—Deposits from members shall be given preference to deposits from non-members.

Bye law 21.—The Board of Directors shall appoint a paid Secretary who shall have no seat in the Board. The Board shall fix the nature and extent of the security to be furnished by the Secretary.

Bye law 25.—Receipts shall be issued for all moneys paid to the society. For moneys paid by members, the receipt shall be signed by the President or the Secretary whoever is selected by the Board of Directors to discharge his function. In the case of borrowings from non-members or from other societies the receipt or bond shall be executed by at least four members of the Board of Directors of whom the President shall be one.

Mr. Ramamurthy, the learned counsel for the petitioner, contends that the Bank is not liable for the unauthorised and fraudulent act of a Secretary committed for his own benefit unless there has been negligence on the part of the bank. His further contentions may be stated thus : There is no warrant or justification either in the Act or rules or bye-laws, that the Secretary was authorised to receive money from the customers. Apart from the forged fixed deposit receipts, the bank accounts did not contain any entry regarding the alleged deposits. The fixed deposit receipts were not signed by the Directors but on the other hand were forged by the Secretary himself. These fixed deposit receipts are simply null and void. They are merely a piece of waste paper. Thus the bank is not liable to pay the respondents any amount found on the fixed deposit receipts but they would be liable only to the extent of the amount found in the account book.

In order to fortify his argument, the learned counsel referred to a leading case, *viz. Ruben* v. *Great Fingall Consolidated*,[1]. The facts in that case are similar to our case. The plaintiff advanced in good faith a sum of money to the Secretary of the defendant company for his own purposes on the security of a share certificate of the company issued to them by the Secretary. This certificate was in point of form in accordance with the Articles of Association in as much as it bore the seal of the company and appeared to be signed by two Directors and counter-signed by the Secretary. The seal of the company was, however, affixed to it by the Secretary fraudulently and without authority and the signatures of the two Directors were forged by him. On the discovery of the fraud, the plaintiff filed a suit against the company on the certificate issued by the Secretary. Their Lordships held that the documents were forged and could not bind the company unless some official acting with his authority had warranted that it was genuine. Even assuming that the Secretary might be taken to have impliedly warranted this, he had no colour of authority, actual, usual, or apparent to do and therefore the company was not bound. Lord Loreburn, L.C. in his speech observed :

" I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected

1. L.R. (1906) A.C. 439.

by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery."

Another noble Lord, Macnaghten said :

"The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit, and no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple. Every statement in the document is a lie. The only thing real about it is the signature of the Secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or bind or affect the company in any way. It is not the company's deed, and there is nothing to prevent the company from saying so."

This case was considered on two occasions by the Court of Appeal in *Kreditbank* v. *Cassel Schenkers, Ltd.*[1], and *South London Greyhound Race Courses Ltd.* v. *Wake*[2]. In the former case, a bill of exchange was signed by the manager of a company with his own signature under words stating that he signed on behalf of the company in favour of the payee to whom the manager was personally indebted. As it was found to be a forgery it was contended before the Court of Appeal that the holders were not entitled to enforce payment of them against the company. Following the principles laid down in *Ruben's Case*,[3] Scrutton, L.J. observed that the doctrine that everybody is presumed to know the contents of registered Articles of Association did not extend to a forgery, a forged instrument being simply null and void. He further observed :

" It seems to me clear that this document is a forgery within the language of the Forgery Act. It contains a false statement, namely, that the manager is acting for the company and it purports to bind the company. That statement is in fraud of the company, and those two elements appear to make the document a forgery within the Forgery Act. That being so, I feel bound by the decision of the House of Lords to hold that in this case it is not open to the plaintiffs to say:

' This matter whether authority has or has not been delegated to Clarke, the Manchester Manager, is a matter of internal management about which I need not inquire under the rule in *Royal British Bank* v. *Turquand.*[4] "

Atkin, L.J., also observed :

" This is the ordinary case of a person having exercised or purported to exercise an authority to bind the company in fraud of the company, outside the scope of his ordinary ostensible authority ......To my mind, inasmuch as the act was done within the ostensible authority of the agent, the principal is not precluded from setting up the want of authority."

In *South London Greyhound Race Courses Ltd.* v. *Wake*[2], the Articles of Association of the company required that the

" seal of the company shall not be affixed except by the authority of a resolution of the Board of Directors and in the presence of at least one director and the Secretary, and the said one director and Secretary shall sign every instrument to which this seal shall be so affixed in their presence."

In this case the Secretary and one of the directors of the company without any authority of any sort or kind of the Board of Directors fraudulently affixed the company's seal on the share certificate, which they both signed, describing themselves, as in fact they were, as Secretary and Directors respectively of the company, and dishonestly issued the said certificate to the defendant. In the course of the judgment Clauson, J. observed :

" The facts, as they have been proved before me, appear to me to bring the case directly within the principles laid down in *Ruben* v. *Great Fingall Consolidated*[3]. If I felt any doubt about it, that doubt would be removed by a statement of the law contained in the judgment of Atkin, L J. in *Kreditbank Cassel* v. *Schenkers Ltd.*[1] In that the case, the learned Lord Justice said: 'But we have the authority of the House of Lords in *Ruben's case*[3] for saying that the doctrine that you need not investigate whether or not the conditions regulating the internal management of the company have been strictly carried out in accordance with the articles has no application in the case of a document which is an obvious forgery.' In this case the defendants are entitled to say : 'These are not our bills and we are not precluded from denying the authority of the person who purported to sign them on our behalf.' "

Following these two decisions it was held that as the seal of the company was not affixed under the authority of the Board of Directors, the certificate was not duly and truly sealed on the company's behalf, and was therefore a forgery and not bind-

1. (1927) All. E.R. 421.
2. L.R. (1931) 1 Ch. 498.
3. L.R. (1906) A.C. 439.
4. (1856) 6 E. & B. 327.

ing on the company, and the company was not, consequently, estopped, from denying the validity of the certificate. The doctrine that one need not investigate whether or not the conditions regulating the internal management of the company have been strictly carried out in accordance with the articles has no application in the case of a document which is an obvious forgery.

Mr. Champakesa Ayyangar, the learned counsel for the respondent argued that the Seretary in the instant case had authority to receive the fixed deposits and every act done by him in the course of his employment would bind the bank. He drew our attention to a case decided in our High Court by Gentle, J. *Mathias* v. *Kilacheri Agricultural Co-operative Bank*[1]. The facts in that case are: the plaintiff's association used to make deposits with the defendant bank through its Secretary. In the course of their dealings the Secretary of the bank received fixed deposits even outside the bank premises and used to issue fixed deposit receipts. It was contended by the bank that the Secretary had authority to receive the deposits only at the bank premises but as he received the deposits outside the bank premises his conduct in receiving the money and his act in giving the fixed deposit receipt was outside the scope of his authority. But this was negatived. Gentle, J., observed :

"It is not contended that the Secretary and Treasurer had no authority to receive money and to receive fixed deposit and that he was not their agent so to do and it was not in the course of his employment so to act. Every act done by an agent in the course of his employment on behalf of his principal and within the apparent scope of his authority binds the principal, unless the agent is in fact unauthorised to do that particular act and the person with whom he is dealing is aware that the agent in doing as he does is exceeding the authority given by the principal."

The learned counsel for the respondent also cited *Lloyd* v. *Grace Smith and Co.*,[2], where the managing clerk of a firm of solicitors in England was authorised to receive deeds and carry through sales and conveyances. In the course of his employment he received a mortgage deed from a widow which was bequeathed to her with instructions to dispose of the same and give the proceeds to her. The managing clerk taking advantage of his position and opportunity, took two documents from her authorising him to transfer the mortgage deed to himself purporting to be in consideration of the money paid to her. He also gave her a receipt for her deeds in his own name. When the fraud was discovered she commenced an action against the company where the managing clerk was employed. The House of Lords held when the managing clerk had authority to receive the deeds, to issue receipt, and to deal with the transactions and to do the conveyances, he was acting within the scope of his authority and a third party dealing in good faith with such a managing clerk who has apparent authority binds the company.

All these cases cited above established two principles. One is that the well established principle that strangers are entitled to assume that all things connected in the transactions and pertaining to the internal management of the company have been validly done has no application to fraud and forged instruments, as forged instruments are simply null and void. The other principle is : A secretary is a mere servant. His position is that he has to do what he is told and no person can assume that he has any authority to represent anything at all. If the secretary is shown to have either express authority to perform certain acts or implied authority by a course of dealing the company would be liable. In other words, if he is acting within the scope of his authority, the actions of the secretary will bind the company, even if done tortiously or fraudulently and even though they enure not for the company's benefit but for the secretary himself.

These established rules and principles will equally apply whether in the Law of Agency, or in the Law of Master and Servant.

In Gower's Modern Company Law at page 157, the learned author has put the whole proposition of law in a nutshell thus :

"If a document purporting to be sealed by or signed on behalf of the company is proved to be forgery, it does not bind the company. But the company may be estopped from disclaiming the

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1. (1938) 1 M.L.J. 241.

2. L.R. (1912) A.C. 716.

document as a forgery if it has been put forward as genuine by an official acting within his actual, usual, or apparent authority and if a transaction is binding on the company under the foregoing rules the company will be liable notwithstanding that the official has acted fraudulently or committed forgery."

Similarly, Bowstead in his well known book "A Digest of the Law of Agency" has stated under Article 82:

"No principal is bound by any act of his agent which is not done within the agent's actual or implied authority unless the principal in fact authorised the agent to do the particular act."

In Smith's "Law of Master and Servant", the learned author states the rule thus at page 229:

"A person may be liable for a fraud committed by his agent or servant, if the agent or servant committed it while acting within the scope of his authority, while doing, and purporting to do, something on behalf of his employer although in doing it he commits a wrong which his employer neither sanctioned nor intended. But if the agent or servant is not acting or purporting to act for his employer, the fraud cannot be treated as the fraud of the employer."

Now we have to consider whether in the light of the above principles the Bank is liable. According to the bye-laws of the bank, in the case of non-members, deposit receipts should be issued by atleast four members of the Board of Directors of whom the President shall be one. The respondent is not a member of this Co-operative Urban Bank. The Secretary was not a director at any time. Though it was brought to our notice that subsequently bye-law 25 was amended thereby authorising the Secretary along with 4 members of the Board of Directors to issue deposit receipts, there is nothing on record to show that after the amendment the Secretary was co-opted as a director or appointed as a director of the petitioner-bank. We do not know whether the bye-law was amended either before or after the suit. Therefore, according to the bye-laws of the Bank, the Secretary has no right nor even apparent authority nor ostensible authority to issue fixed deposit receipts to a non-member. The fact that the deposit receipt is in the proper form and delivered by the Secretary in the ordinary course of duty does not operate as a representation of genuineness and estop the bank from denying its validity. The directors of the bank do not hold to the depositors the duty of adopting unusual precautions to discover whether or not such employees or agents are doing their duty or perpetrating frauds. In any event, the Secretary is not authorised or empowered to issue deposit receipts as per the provisions of the bye-laws framed by the petitioner bank. While issuing the fixed deposit receipts to the respondent, the Secretary is not acting within his authority or in the course of his employment or within the scope of his agency. The Secretary in this case exercised or purported to exercise an authority to bind the bank by committing a fraud and thereby he acted outside the scope of his ordinary ostensible authority. When he has no such authority, the deposit receipt signed by him is only a waste paper. Further, he has forged the signature of the directors and thereby committed a fraudulent act. Certainly the fraudulent act of the Secretary of the bank would not bind the bank. Though the learned District Munsif gave a finding that the fixed deposit receipts were not genuine, still he was of the view that as the Secretary was authorised to receive the money, the petitioner-bank should be held responsible. We think that this is not a correct view according to law and according to the bye-laws of the bank. We hold that the fixed deposit receipts bearing No. 1293 for a sum of Rs. 2,300 and No. 1192 for a sum of Rs. 550 issued by the Secretary are not valid receipts and they are not binding on the petitioner-bank. The learned District Munsif has also given a finding that in any event the bank is liable to pay interest for the fixed deposit of Rs. 1,000 as found in the account books of the bank under the heading F.D. No. 1293 dated 24th January, 1955. We agree with him.

In the result, we set aside the judgment and decree of the learned District Munsif and declare that the plaintiff is entitled to interest on the fixed deposit of Rs. 1,000 above referred to. The suit is otherwise dismissed. No costs.

P.R.N. ——— *Petition allowed and decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

Kaliappan s/o. Konayan .. *Petitioner**

v.

Kaliappan and others .. *Respondents.*

Criminal Procedure Code (*V of* 1898), *section* 342—*Applicability—Summons case—Procedure—Examination of defence witnesses without questioning the accused—Effect.*

In a summons case the Magistrate is not called upon mandatorily by any provision of the Criminal Procedure Code (V of 1898) to question the accused either generally or on any facts appearing in the evidence against him after the prosecution witnesses are examined and before the defence witnesses are called and the latter part of section 342 (1) of the Code which is mandatory in its scope applies only to warrant cases and not to summons cases.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the District Magistrate (*J*), salem in C.A. No. 645 of 1960 (C.C. No. 1328 of 1960) on the file of the Court of the Sub-Magistrate, Dharmapuri).

Fyzee Mohamood, for Petitioner in Cr.R.C. No. 1095 of 1960 and for Respondent in Cr.R.C. No. 1200 of 1960.

G. Gopalaswami and *V. Gopinathan*, for Respondents in Cr.R.C. No. 1095 of 1960 and for Petitioners in Cr.R.C. No. 1200 of 1960.

M. Narayanaswami, for the Public Prosecutor on behalf of the State in both the cases.

The Court made the following

ORDER.—What has happened in this case is that the learned District Magistrate of Salem in hearing an appeal preferred against convictions under sections 323 and 447, Indian Penal Code, set aside the convictions and sentences and remanded the case for fresh trial. This in his opinion became necessary for the reason that a grave illegality had been committed in the trial of the case and that the trial Magistrate had followed a procedure which was not warranted by law. He thought that the Magistrate, after finishing examination of four prosecution witnesses, immediately examined two defence witnesses without questioning the accused under section 342, Criminal Procedure Code and that the failure of the Magistrate to question the accused under section 342, Criminal Procedure Code, vitiated the convictions. It seems to me that in coming to this conclusion the learned District Magistrate was wholly in error. That this was a summons case must have been perfectly obvious and though section 342, Criminal Procedure Code in the enabling part of that provision would apply equally to a summons case, the Magistrate is not called upon mandatorily by any provision of the Code to question the accused either generally or on any facts appearing in the evidence against him after the prosecution witnesses are examined and before the defence witnesses are called. The latter part of section 342 (1) which is mandatory in its scope clearly applies to warrant cases , that is, cases triable under the warrant procedure. The framing of the charge and the questioning of the accused before the charge is framed takes place on the first appearance of the accused before the Magistrate in the case of summons cases. This is so provided for by section 242, Criminal Procedure Code. Consequently, there does not appear to be any need for the examination of the accused in the manner set out in section 342 in the trial of a summons case. When that is not contemplated by the Code, the District Magistrate was clearly in error in thinking that the trial was vitiated by the non-examination of the accused under that provision of the law.

It has been argued, on behalf of the third accused in particular, that when the question was put to him under section 342, what he stated was that when he went alone to Moolakkadu, the complainant who was ploughing, came; and he and his men beat him (the 3rd accused). It is stated by the learned counsel that there was another counter-case is connection with this alleged beating. It is suggested

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* Crl. R.C. Nos. 1095 and 1200 of 1960. Crl. R. P. Nos. 1064 and 1169 of 1960.

12th October, 1960. (20th Asvina, 1882, Saka.)

that more particularly for the reason that the question put by the Magistrate to these accused persons did not specifically draw their attention to the alleged offence under section 447, in the special circumstances relating to the third accused, it would have been proper for the Magistrate to have questioned him in this regard drawing his attention to the allegation that the offence of criminal trespass was also being charged against him. It may also be mentioned that after the close of the examination of the witnesses on both sides, the first accused was also generally questioned, more particularly with regard to the factum of possession of the land in dispute. Apparently, the trial Magistrate wanted to clear up any doubts on the question of criminal trespass. The learned counsel accordingly argues that the other accused, particularly, the third accused should also have been questioned in this connection.

As far as I can see, the question that has been put to all these accused, though it mentions section 323, clearly specifies that these accused persons entered upon the land in possession of P.W. 1 and beat him. The fact that section 447 or the offence of criminal trespass is not in so many words specified does not matter. This charge also has been brought to the notice of the accused and that to my mind is sufficient.

In the view that I have taken that the trial has not been vitiated by the non-examination of the accused in the manner required by section 342, Criminal Procedure Code, it follows that the order of the District Magistrate setting aside the conviction and remanding the case for fresh trial is incorrect. That order is set aside. The appeal is, therefore, directed to be restored to file and heard on mertis

Cr.R.C. No. 1200 *of* 1960.

There is no need to interfere.

K.L.B. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

Mannankatti Ammal .. *Appellant**

v.

Vaiyapuri Udayar and others .. *Respondents.*

Contract Act (IX of 1872), *section* 16—*Burden of proof—Undue influence—Inference from circumstances—Settlement deed in favour of person standing in close and fiduciary relationship—Validity—Onus.*

Normally it would be for the person who pleads undue influence to establish that fact. But where confidential relations exist between the parties, those standing in such relations are not entitled to hold benefit unless they can show that the party who has conferred the benefit had competent and independent advice. Where the relations between a donor and donee or settlor and settlee have at, or shortly before the execution of the gift or settlement been such as to raise a presumption that the donee or settlee had influence over the donor or settlor, the Court would set aside the voluntary gift or settlement unless it is proved to its satisfaction that in fact the gift or settlement was the spontaneous act of the donor or settlor acting under circumstances which enabled him to freely exercise his independent will and mind.

Appeal against the Decree of the Court of the Subordinate Judge, Cuddalore, in Appeal Suit No. 246 of 1955 preferred against the Decree of the Court of the District Munsif of Kallakurichi in Original Suit No. 117 of 1954.

K. S. Naidu for Appellant.

T. M. Krishnaswami Ayyar, for Respondents.

The Court delivered the following

JUDGMENT.—The question in this appeal is whether the settlement deed executed by the 1st defendant on August 29, 1959 is binding on him. Both the Courts

* S.A. No. 167 of 1959.

13th December, 1960
(22nd Agrahayana, 1882, Saka).

below held that it was not. The plaintiff, who on the strength of the settlement sought and failed to obtain a declaration of her title to and injunction in respect of the suit properties, has come up to this Court in Second Appeal.

The plaintiff is the elder sister of the first defendant. Their father and the plaintiff's husband had died years ago. It is in evidence that the plaintiff was living with the first defendant for 20 years past managing his properties. She brought him up practically from his young age, and got him also married. The first defendant's wife, the second defendant, is said to have contracted leprosy about four years prior to the settlement deed and at the time of its execution she had a daughter and another child in the womb. Six months after the settlement deed, the second defendant was delivered of a female child. The settlement deed was executed by the first defendant at Chidambaram where it was registered. The 'A' schedule properties, which consisted of the bulk of the properties owned by the first defendant, were settled by him absolutely on the plaintiff. The remaining properties were settled by him on the second defendant for life with the remainder to the first defendant's daughter Neelavathi absolutely. There was a further provision that if Neelavathi predeceased her mother, the B schedule properties should be taken by the plaintiff herself absolutely. The settlement deed recited that pursuant thereto, the first defendant had delivered possession of A schedule properties to the plaintiff. Then came a provision which stated that since the second defendant was living with the first defendant and that though he had handed over the B schedule properties to her, she was bound to maintain him during his lifetime. The reason for the execution of the settlement deed was mentioned to be that A and B schedule properties had been acquired by the joint exertions of the first defendant's father and the husband of the plaintiff. An additional reason, as stated in the settlement deed, was that as the second defendant was suffering from a skin disease, the first defendant might not be able to get any male child by her.

According to the plaintiff, the first defendant had been instigated by Duraiswami Odayar and Appavoo Pillai, who have given evidence on her side, to question the title of the plaintiff to the suit properties under the settlement deed and the first defendant, as a result, was attempting to trespass upon them. She, therefore, sought for a declaration of her title to and for an injunction restraining the first defendant from interfering with her possession of the properties. Both the defendants resisted the suit on various grounds. The first defendant denied having executed the settlement deed in favour of the plaintiff and averred that the plaintiff's son and one Kuppuswami Odayan took him to different places presumably for consultation in connection with his wife's skin disease and while at Chidambaram they procured a document from him the contents and nature of which he never agreed to. The first defendant maintained that the settlement deed was a fraudulent document got from him taking advantage of the confidential relationship and his mental weakness. According to him, he came to know only later that what he had been made to execute, was a settlement deed. The second defendant, while supporting the case of the first defendant further pleaded that the first defendant was not a normal man, that he did not know the distinction between good and bad, that he had been simply obeying the orders of the plaintiff all along, who was managing the properties right through and that, in the circumstances, the settlement was not executed by the first defendant with his free consent but was executed as a result of fraud and undue influence.

In the light of the findings of both the Courts below, it is now common ground that the plaintiff, as a matter of fact was, in management of the properties covered by the settlement deed for over 20 years prior to the suit and that she brought up the first defendant after the death of his father and got him married. He was practically a do-little, leaving the entire responsibility of managing his properties to the plaintiff. In fact, both the Courts below have recorded their impression that a look at the first defendant was enough to show that he was not in a position to manage and look after his lands. The second defendant was afflcted by leprosy and she had a minor daughter when the settlement deed was executed and another

daughter was born to her six months after its execution. The findings of both the Courts below were also that the settlement deed was executed by the first defendant at Chidambaram after he had been taken from place to place by the plaintiff's son and one Kuppuswami. The lower appellate Court went so far even to say that the first defendant was mentally imbecile. In the light of those circumstances both the Courts were inclined to think that the settlement deed was got executed by undue influence, misrepresentation, fraud and deceit. The Courts below derived further support for their view by reference to the extent and nature of the dispositions themselves in the settlement deed. The settlement deed reserved nothing for the first defendant who had completely denuded himself of all his properties by executing it. More than that, the bulk of the properties were given the plaintiff absolutely. In the event of the first defendant's first daughter predeceasing her mother, even the remaining properties, covered by the B schedule to the settlement should be taken by the plaintiff absolutely. The second daughter was at the time of the execution of the settlement deed in the womb of her mother and the child was actually born six months after its execution. Nevertheless no provision was made for the child to be born. In addition the reasons given for the execution of the settlement deed were, as a matter of fact, found to be not true. Both the Courts below have found that the properties were not the joint acquisitions of the first defendant's father and the husband of the plaintiff. Another recital in the settlement deed, as already noticed, was that because the first defendant had no hope of getting a son by the second defendant he was executing the settlement deed. But this reason evidently appeared to be not quite true because the first defendant must have known that the second defendant was pregnant at the time. These circumstances, according to the Courts, below, provided additional grounds for not upholding the settlement.

Sri K. S. Naidu, the learned counsel for the appellant, pressed before me that although the defendants came to Court with a specific case that the settlement was vitiated by undue influence, actually in the evidence of the first defendant his case was that he executed the settlement deed under the belief that it was a power of attorney. The learned counsel further contended that even in respect of the case of undue infleunce there was absolutely no evidence in support of it. It was argued that it was for the first defendant who challenged the settlement on the ground of undue influence to establish that fact. On the other hand, the contention of Sri T. M. Krishnaswami Ayyar, the learned counsel for respondents 1 to 3, was that having regard to the position and relationship of the plaintiff and the first defendant and also to the fact that the first defendant was more or less a ward of the plaintiff who had brought him up and got him married, and that she was in management of his properties for over 20 years prior to suit, a presumption of undue influence arose and that in the circumstances it was for the plaintiff to establish that the first defendant had executed the settlement deed voluntarily and with a free mind.

It is no doubt true, as contended by Sri K. S. Naidu, that the first defendant changed his version when giving evidence, from undue influence to misrepresentation. It is also true that the lower appellate Court was not quite right in thinking that the first defendant was mentally imbecile. The lower appellate Court formed that impression because in its opinion the trial Court was convinced about it by a look at the first defendant. Sri K. S. Naidu contended that a reading of the first defendant's evidence would show that he was far from mentally imbecile. Sri T. M. Krishnaswami Ayyar did not support the observation of the lower appellate Court that the first defendant was mentally imbecile. But the fact remains that his mental condition had to be assessed in the setting of the entire circumstances. Viewed in that manner, it appears to me that the first defendant was certainly under the influence of the plaintiff who did everything for him both in respect of his personal welfare and also of his properties, for long years. Sri K. S. Naidu adverted to the observations of the lower appellate Court that no provision was made for the maintenance of the first defendant and contended that this was entirely wrong. I do not entirely agree with him. The only provision made in the settle-

ment deed is that during the lifetime of the second defendant she should maintain the first defendant. What was to happen, to the maintenance of the first defendant if the second defendant pre-deceased him, was not mentioned. Although Sri K. S. Naidu criticised the observation of the lower appellate Court, it was also right in making it that no provision was made in the settlement deed for any child to be born to the second defendant after its execution. It was pointed out by the learned counsel for the appellant that practically there was no evidence on the side of the defendants in support of their case of undue influence. But the question is whether in the circumstances of this case it was for them to establish that the settlement was vitiated by undue influence.

Normally it would be for the person who pleads undue influence to establish the fact. But in this case, as contended by Sri T. M. Krishnaswami Ayyar, the circumstances in which the settlement deed was executed appear to be such as give rise to a presumption of undue influence. In support of his contention, the learned counsel for respondents 1 to 3, relied on a number of authorities. But it is only necessary to notice a few of them. *Narayana Doss Balakrishna Doss* v. *Buchraj Chordia Sowcar*[1], was a case in which at the instance of his maternal uncle the nephew executed a mortgage in favour of a third party. It was established in that case that the maternal uncle was constituted a trustee of the properties of the nephew and while being in such a confidential relationship, he prevailed upon the nephew to execute a mortgage. It was also found that the mortgagee was not unaware of the influence of the maternal uncle over his nephew. In those circumstances, Venkatasubba Rao, J., was of the view that it was for the mortgagee to establish that the mortgage was a fair and independent transaction. In the course of his judgment the learned Judge referred to various English cases decided by the Court of Chancery and formulated the principle that

> "where confidential relations exist those standing in such relations cannot entitle themselves to hold benefits unless they can show that the persons who have conferred the benefits had competent and independent advice."

In *Inche Noriah binte Mohamed Tahir* v. *Shaik Allie bin omar bin Abdullah Bahashuan*[2], the Privy Council held that where the relations between the donor and donee had at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor, the Court should set aside the voluntary gift, unless it was proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justified the Court in holding that the gift was the result of a free exercise of the donor's will. In that case the appellant before the Privy Council sued to set aside a deed of gift of substantially all her properties executed by her in favour of the respondent, a nephew by marriage of the appellant. It was found that the appellant was wholly illiterate and was a feeble old woman unable to leave the house, relying entirely upon the respondent for everything and leaving the management of her affairs to him so that she had no knowledge of her own affairs. The circumstances showed that the appellant was totally and completely in the respondent's hands. The Privy Council was of the view that the relations between the appellant and the respondent were amply sufficient to raise the pressumption of the influence of the respondent over the appellant and to render it incumbent upon him to prove that the gift was the spontaneous act of the appellant acting under circumstances which enabled her to exercise an independent will and which justified the Court in holding that the gift was the result of the free exercise of her will. The Privy Council referred to the decision in *Allcard* v. *Skinner*[3], and quoted the following observations of Lord Justice Cotton as containing the principles which should govern such a case:

> "The question is : Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside ? These

1. (1927) 53 M.L.J. 842.
2. (1928) 56 M.L.J. 349 (P.C.).
3. (1887) L.R. 36 Ch. D. 145 at 171.

decisions may be divided into two classes : first, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose ; secondly, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases, the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

Tungabai Bhratar v. *Yeshwant Dinkar*[1], which was also a case decided by the Privy Council was one in which a wife executed a mortgage in favour of a third party securing the debt of her husband. In dealing with the transaction, Lord Goddard observed :

" It would certainly not be true to say that there is a presumption in every case where a wife confers a benefit on her husband without consideration. Equally it is not necesasry in order to establish the presumpption that the parties should stand in some particular category of relationship to each other."

The Noble Lord while dealing with the manner in which the High Court had approached the question said :

" It is unnecessary to decide whether there was actual fraud by the husband ; it is enough to show that the wife was acting under this influence and not as a free agent."

Rama Patter v. *Lingappa Gounder*[2], was also a case of undue influence in which too a third party was involved. The learned Judges while repelling an argument to the contrary, held that the principles followed by the Courts of Equity in England dealing with similar transactions were equally applicable in this country. One other case that may be noticed is the recent one in *Abdul Malick Sahib* v. *Muhammed Yousuf Sahib*[3]. It was there held that transactions in the nature of a bounty from a child to a parent were in equity looked upon with caution by Courts and it was the duty of the donee to prove that the gift was the result of free exercise of independent will and the Court should be satisfied that the donor was acting independently without any influence from the donee. It was there further pointed out that the mere existence of the fiduciary relationship, of parent and child between the donee and the donor raised a presumption of undue influence and it was on the donee to rebut the presumption.

An examination of the above cases would show that they fall under three classes : (1) Where a donee by exercising undue influence gets a gift executed in his favour ; (2) Where the donee being in a confidential relationship with the donor gets a benefit in the form of a gift from the donor without the donee actually exercising any fraud or undue influence ; and (3) where a document is executed in favour of a third party at the instance of a person who is in a position to dominate the will of or in a confidential relationship with the executant. *Narayana Doss Balakrishna Doss* v. *Buchraj Chordia Sowcar*,[4] *Tungabai Bhratar* v. *Yeshwant Dinkar*[1] and *Rama Patter* v. *Lingappa Gounder*[2], were cases falling under the third class where a third party was involved, which is not the position here. The instant case will not fall under class (1) either, because there is no evidence in this case of the plaintiff herself having exercised any undue influence over the first defendant. But it seems to me that this will come under the second class above mentioned, which corresponds with the second class of cases noticed by Lord Justice Cotton in *Allcard* v. *Skinner*[5] ; *Mohamed Tahir's case*[6], was of this type, and so too *Abdul Malik Saheb* v. *Md. Yousuf Sahib*[7].

In this case, the circumstances already mentioned clearly point to the fact that the first defendant was subject to the control of the plaintiff. She was completely

1. (1944) 2 M.L.J. 350 : L.R. 71 I.A. 184 : I.L.R. (1945) Bom. 189 (P.C.).
2. (1934) 69 M.L.J. 104.
3. (1960) 2 M.L.J. 355.
4. (1927) 53 M.L.J. 842.
5. (1887) L.R. 36 Ch. D. 145.
6. (1928) 56 M.L.J. 349 : A.I.R. 1929 P.C. 3 (P.C.)
7. (1960) 2 M.L.J. 355.

in charge of the first defendant's properties and in management thereof. She brought him up and got him married. There is no evidence of the first defendant having at any time interfered with the plaintiff's management. There is also evidence that the first defendant was simply obeying the plaintiff. It seems to me that these circumstances raise a presumption that the settlement was not the result of the free will of the first defendant. The nature of the disposition also strengthens that conclusion. No transaction can be more improvident on the part of the first defendant than the settlement in question. He denuded himself of all the properties and made little provision even for his own maintenance in the event of the second defendant pre-deceasing him. He gave more than the bulk of the properties to his sister and even the other properties covered by the settlement were to go to her absolutely on the happening of a certain event. What is more strikingly strange than all these is the fact that, although the first defendant must have known that the second daughter of his was then in the womb the settlement deed made no provision whatever for her. One of the reasons for executing the settlement was the fear on the part of the first defendant that he would not get a male child at all by the second defendant. This *ex facie* appears to me to be equally strange because as a fact the second defendant was *enceinte* at the time of the execution of the settlement. In the light of these circumstances, therefore, I consider that it was entirely for the plaintiff to establish that the settlement deed was executed by the first defendant of his own free will and with independent advice.

Both the Courts below felt that all was not well with the settlement deed. In the background of things, they thought that the settlement deed must have been obtained not with the free will and consent of the first defendant. In any case, the Courts below were not satisfied that the plaintiff had established that the settlement was a fair transaction. Having regard to all the facts and circumstances, I do not feel persuaded to disturb the conclusion of both the Courts below.

The Second Appeal fails and is dismissed with costs. No leave.

P.R.N. — *Appeal dismissed.*
Leave refused.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

Khan Bahadur C. K. Mammad Keyi, Tellicherry .. *Petitioner**

v.

The Assistant Controller, Estate Duty-*cum*-Income-tax Circle, Coimbatore. .. *Respondent.*

Estate Duty Act (XXXIV of 1953), *sections* 5,6, 7 (1) *and* 29(2)—*Applicability—Moplah Tarwad governed by Marumakkathayam Law registered as impartible under section* 21 *of Moplah-Marumakkathayam Act (Madras Act (XVIII of* 1939)—*Right of member of tarwad—If " interest " passing on death of member—Interpretation of Statutes—" Including "—Meaning of—Madras High Court-fees Rules,* 1956, *Rule* 16—*Applicability to proceedings under Article* 226 *of the Constitution of India* (1950).

A Moplah tarwad governed by the Marummakkathayam Law of Inheritance, whether it is impartible by custom or statute, *e.g.*, by an order under section 21 of the Moplah Marumakkathayam Act (Madras Act XVII of 1939), is clearly brought within the scope of section 7 (1) of the Estate Duty Act, though sections 5 and 6 of the Act may not apply. When a female member of such a Moplah tarwad registered as impartible dies, section 7 (1) of the Estate Duty Act does certainly apply. It is immaterial to whom the interest of the deceased person passes. The cessor of the interest of the deceased leads to the accrual of a benefit to the other surviving members and therefore section 7 (1) of the Act is attracted. It cannot be said that there is no enlargement of the rights of the other members of the tarwad.

Section 39 (2) of the Act is certainly comprehensive enough to include a Mahomedan tarwad governed by the Marumakkathayam rule of inheritance. The right which a member of the tarwad possesses is undoubtedly an interest in property, within the meaning of section 7 (1). This interest which is a tangible one cannot be held to reduce itself to nothing by reason of the death of the member concerned. The cessor of that interest must necessarily enlarge the interests of the remaining members of the family and must therefore result in the conclusion that a benefit does arise to the other members of the family.

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* W.P. No. 105 of 1957. 23rd January, 1961
(3rd Maga, 1882, Saka)

Manikath Ammani Ammal v. *Padmanabha Menon*, (1911) 35 M.L.J. 509 and I.L.R. 41 Mad. 1075; *Govindan* v. *Kannappan*, (1936) 71 M.L.J. 514, relied on.

The word " including " in section 7 (1) (as in the case of any statute) cannot be read as a term of limitation or precise definition ; it includes matters thereafter mentioned ; in other words it is a word of enlargement rather than restriction.

Case-law reveiwed.

Rule 16 of Order 5 of the Madras High Court-fee Rules, 1956, would govern proceedings unde Article 226 of the Constitution. There is nothing in the Rules framed to regulate proceedings under Artice 226, inconsistent with rule 16 of Order 5. The High Court has, therefore, jurisdiction to fix a fee higher than Rs. 250 refered to in rule 7 (2 of the rules governing proceedings under Article 226.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiotrari* calling for the records relating to the order, dated 4th January, 1957, in G.I. No. K./6/KZD on the file of the Assistant Controller, Estate Duty-*cum*-Income-tax Circle, Coimbatore and quash the said Order.

M. K. Nambiar and *K. K. Venugopal*, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) for *C. S. Rama Rao Sahib*, Special Counsel for Income-tax, for Respondent.

The Order of the Court was made by

Srinivasan, J.—This petition seeking a writ of *certiorari* arises under the following circumstances. The petitioner is the Karnavan and manager of an impartible taward governed by the Moplah Marumakattayam Act (Madras Act XVII of 1939). In January, 1956, the Income-tax Officer, Tellicherry, called upon the petitioner to furnish him with particulars of the estate of the late Chowakkaran Keloth Kunhamina. The petitionr informed the Income-tax Officer that the late Kunhamina, who was a member of the tarwad, had no assets whatsoever and had no estate belonging to her which devolved on any other person. In this letter, the petitioner stated that the tarwad had been registered under section 21 of Madras Act (XVII of 1939), with the result that the late Kunhamina as well as other members of the tarwad had no right to claim a share in the tarwad properties. Thereupon, the Assistant Controller of Estate Duty called upon the petitioner to produce the record relating to the registration of the tarwad as impartible. This was apparently done. Thereafter, the Assistant Controller, seeking to examine the contention that on the death of a member of a tarwad registered as impartible, as stated above, no share in the tarwad properties passed to any other member, posted the case for hearing and directed the petitioner to appear before him. Owing to various reasons an enquiry was not conducted, and finally, on 4th January, 1957, the Assistant Controller wrote to the petitioner to this effect :

" I am not prepared to accept your contention that in the circumstances stated by you the deceased was not entitled to a share in the tawad properties at the time of her death. Even though the tarwad was registered as impartible estate under the provisions of the Moplah Marumakkattaym Act, it cannot be said that the members of the tarwad were deprived of their shares in the tarwad properties for ever........ The share of the deceased in the tarwad properties will therefore be liable to estate duty as interest ceasing on death under section 7 of the Estate Duty Act."

" Herewith two forms of E.D. 1 are enclosed which may be duly filled in and returned to this office on or before 20th January, 1957................"

E.D. 1 form referred to purports to be a form of declaration to be subscribed to by the person making the return admitting the fact that the deceased had certain properties which passed on death and furnisheing particulars thereof.

Upon this direction of the Assistant Controller, the petitioner has come to this Court seeking the issue of a writ of *certiorari* claiming that the decision of the Assistant Controller, that the share of the deceased in the tarwad properties will be liable to estate duty under section 7 of the Act, is totally without jurisdiction, illegal and unjustifiable, and that the reasons on which the Assistant Controller came to this conclusion are patent errors of law on the face of the order.

In the counter-affidavit filed by the Department, after setting out the reasons which led the Assistant Controller to come to the conclusion that is now challenged, it was stated that the petition is premature, as, except for the issue of the notice calling for a return, no proceedings have been taken, nor the assessment completed on the petitioner.

When the petition first came up for hearing, the petitioner urged that the Assistant Controller had decided, and decided the issue *ex parte*, that the deceased had a share in the tarwad properties, and that that share had passed on her death to the surviving members of the tarwad. The contention of the Department was that nothing had really been 'decided' despite the apparent tenor of the letter, dated 4th January, 1957. A memorandum was filed into Court offering to withdraw the letter, dated 4th January, 1957; and the Department claimed that it should be left free to decide whether estate duty was payable either on the basis of section 5 or on the basis of section 7 of the Eastate Duty Act. The learned counsel for the petitioner contended that no estate duty was payable under the terms of the Act, and that though it was a writ of *certiorari* that had been asked for, the main question at issue should be decided by the Court, and that if the petitioner's contention was upheld, a writ of prohibition should issue to restrain the respondent from taking any further proceedings under the Act.

The contention of the petitioner broadly stated is that the incident upon which duty becomes chargeable under the Act, *viz*., the passing of property on the death of a person dying after the commencement of this Act, has not happened in this case. It is claimed that Kunhamina was only a member of a Moplah tarwad which, besides being impartiable under the Marumakkattayam Law governing such tarwards, has been specifically made impartible by an order of the Collector made under section 20 (1) of the Moplah Marumakkathayam Act (Madras Act XVII of 1939). A member of a Moplah tarwad governed by the Marukakathyam Law was at no time entitled to partition as a matter of right, and that position has been statutorily confirmed in certain proceedings taken by the members of the tarwad in this particular case under the above-said Act. The claim proceeds that the late Kunhamina accordingly never posessed a share in the properties, either factual or notional a share which could pass on her death to other persons. The next argument is that no member of a tarwad is competent to dispose of the tarwad property. On these contentions the applicability of section 5 or section 6 of the Estates Duty Act is questioned. Coming to section 7 which deals with interests ceasing on death, the contention of the learned counsel for the petitioner is that a close examination of this provision would show that it is applicable only to Hindu families and that a Mohammadan family governed by the Marumakkathayam Law is not brought within the scope of this section. Having briefly stated the contentions, we shall next proceed to examine them in some detail.

It is desirable at the outset to ascertain more precisely what the incidents of a family governed by the Marumakkathyam Law are. It is well known that there were both Hindu and Mohammadan families on the West Coast governed by this law. In the Treatise on Malabar and Aliyasantha Law by Sundaram Iyer, the constitution of and the incidents relating to the joint family governed by the Marumakkathayam Law have been set out as below. The joint family in a Marumakkathayam Nair tarwad consists of a mother and her male and female children and the children of those female children and so on. The issue of the male children do not belong to their tarwad but to the tarwad of their consorts. The property belonging to the tarwad is the property of the males and females that compose it. Its affairs are administered by one of those persons, usually the eldest male, called the Karnavan. The individual members are not entitled to enforce a partition, but a partition may be effected by common consent. The rights of the junior members are stated to be: (1) if male, to succeed to management in their turn; (2) to be maintained at the house; (3) to object to an improper alienation or administration of the family property; (4) to see that the property is duly conserved; (5) to bar adoption; and (6) to get a share at any partition that may take place. These are what may be

called the effective rights. Otherwise every one is a proprietor and has equal rights. It is accordingly claimed that a tarwad governed by the Marumakkathayam Law was generally speaking impartible in the sense that unless all the members agreed thereto, a partition of the tarwad properties could not take place. Madras Act (XVII of 1939) for the first time gave a right to any individual member of a Moplah tarwad to claim his or her share of the properties of the tarwad and to become separate from the tarwad. The need for the common consent of all members of the tarwad was thus statutorily done away with, and for the first time a right was created whereby an individual member of a tarwad could claim partition and obtain his or her share of the properties therein. This Act also codified the other features relating to the Moplah tarwad, its management by the Karnavan, the rights and duties of the Karnavan, the prohibition against alienations and the like. The right of a junior member to sue the Karnavan for malfeasance, neglect of duty, misappropriation and even for his removal was also recognised by section 11 of the Act. Chapter III of the Act provided for partition of tarwad property, and as has been stated earlier, every individual member of the tarwad was given such a right. In order, however, to maintain the family as an impartible unit, where the members desired to have it so, section 20 provided that if within a year after the passing of the Act not less than two-thirds of the major members of the tarwad presented a petition to the Collector to have the tarwad registered as impartible, it could be so registered, and on such registration, the provisions of Chapter III relating to the partition of the tarwad properties became inapplicable to such a registered tarwad. In a similar manner, the cancellation of registration with the consequent restoration of the right to partition on demand by any individual member of the tarwad was provided for by section 21 of the Act. In effect, Act (XVII of 1939) besides placing on a statutory footing the customary law governing the Moplah tarwads in general, created a right in every individual member to partition, a right which did not exist previously.

The contention of the petitioner is based upon these incidents of a Moplah family. The learned counsel argues that, where no member of the family is entitled to a partition, he cannot be deemed to possess any interest in any specified portion of the family property which could pass on his death to any other person or persons. On the other hand, the learned Advocate-General appearing for the Department, presses for the other extreme view, *viz.*, that both as recognised by the customary law and as confirmed by Act (XVII of 1939), a tarwad means nothing more than a joint family which includes all its members with a community of property governed by the Marumakkathayam Law. It is argued that every member of a tarwad is equally a proprietor, and has equal rights, and since all of them possess community of property in the entirety of properties owned by the tarward, each member may be said to own the whole of the property of the tarwad, and that it should thereupon follow that the property as a whole must be held to pass on the death of any individual member of the tarwad. It seems to us that such a claim is not sustainable. Notwithstanding the fact that every female member of a tarwad similarly situate possesses equal rights, it is obvious that no one member can be said to possess the property of the tarwad. Except for the right of management which vests only in the Karnavan, the right of every other member of the tarwad consists of a right to be maintained consistent with the income and the circumstances of the tarwad, provision for customary or legitimate expenses such as education, marriage or death of the members of the tarwad, the right to interdict any alienation of immoveable property by the Karnavan which may be against the interests of the tarwad and sue for his removal. The right to partition is not a normal right, available to a member of an impartible tarwad, but is contingent upon a majority of the members of the tarwad agreeing to have such a partition. Even if this bundle of rights of a junior member is " the property " which he possesses in the sense of an interest in the property of the tarwad, obviously, such rights as these are individual and personal to a member of the tarwad, and it is not this bundle of rights which could pass on the death of that member. It seems to us, therefore, that the liability to estate duty in a case of this kind does not fall to be considered under section 5 of the Estate Duty Act. Not only does the definition of 'tarwad' in the Act indicate that all the members have community of property; but section 13 of the Madras

Act which provides for a partition refers to the properties as those over which the "tarwad" has power of disposal. That this is the real position has been recognised in numerous decisions.

In *Chakkra Kannan v. Kunhi Pokker*[1], Srinivasa Ayyangar, J., observed :

" In India it is not uncommon for groups of persons though not incorporated to hold properties as if they were corporate entities. Castes and sub-castes hold proprety as such, so also village coommunities. But the more common and familiar instances of such groups in Southern Inida are the joint Hindu family governed by the Mitakshara Law, the Nambudri illom governed by the Marumakkatayam Law, the Nayar tarwad governed by the Marumakkattayam Law, and the Aliyasanthana family of South Canara. The Mappillas of North Malabar generally follow the Marumakkattayam system and the parties to this suit are governed by that law. The incidents of such group holding are now well-settled. In the case of a Malabar tarwads such incidents include the impartibility of the property, the right by birth of person born in the tarwad, and the management of the properties by the senior male member of the tarwad who is styled the Karnavan."

Latter he observes :

" These groups cannot of course be created by agreement of parties. The tavazhis or the subordinate groups constituting the tarwad are, I think, capable of holding properties as corporate units with the incidents of tarwad property, at the same time retaining their joint interest in the properties of the main tarwad, just as branches and sub-branches in a Mitakshara joint Hindu family are capable of holding properties with the incidents of joint Hindu family property."

In *Paru v. Raman Nambiyan*[2] the question arose whether by reason of the conversion of a Hindu member of a Malabar tarward, the right to partition became available. It was held that notwithstanding the apostasy of the member, a right to partition of tarwad property would not arise. Kumaraswami Sastri, J., noticed :

" It is clear that a member of a tarwad has no right to claim partition, as tarwad property is indivisible and no one member, nor even all but one, can enforce a division upon any who object."

In *Subramanyam Tirumurupu* v. *Naraina Tirumurupu*[3], it was noticed :

" Under the Marumakkathayam Law, no member of a Malabar tarwad has got any definite share but the property of the tarwad is vested in all the members comprising the tarwad. The tarwad is impartible except with the consent of all the members or probably with the consent of the adult members of the family and by reason of this limitation, no individual member can alienate the property nor can his interest therein, be seized and sold in execution by a creditor for his personal debt. This incapacity is due to the fact of there being no right of compulsory partition and therefore no right to have the interest separated for separate enjoyment. Nevertheless, the interest is proprietary and a vested interest though joint................."

These authorities,in addition to the provisions of the Marumakkathayam Act referred to and the extract from the Treatise of Sundaram Iyer,clearly establish that an individual member of an impartible tarwad has no doubt an interest in the property in the sense of his being entitled to certain benefits arising from the property. He has no share therein. Nor can his interest be equated to one of ownership over the whole of the tarwad property which can be said to pass on his death. Indeed, it is difficult to see how in such incident there can be any passing at all. In *Nevill* v. *Commissioners of Inland Revenue*[4], the provisions of the United Kingdom Finance Act of 1894 were considered. This Act also deals with the Estate Duty and Haldane, L.C., observed that " passess " may be taken as meaning 'changing of hands.' If the property is owned by the tarwad and this tarwad has the power of disposal over the property the death of a single member of the tarwad makes no change in the possession of the property by the tarwad considered as a community, and, therefore, it is obviously impossible to hold that the entire properties of the tarwad changes hands on the occasion of the death of each and every individual member of the tarwad. It has also been laid down in the decisions referred to earlier, that though not strictly analogous, the tarwad partakes of the nature of the corporate entity in its capacity for holding property. In *Kalliani Amma* v. *Govinda Menon*[5], it was observed :

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1. (1915) 29 M.L.J. 481 : I.L.R. 39 Mad. 317 (F.B.).
2. (1921) 41 M.L.J. 243 : I.L.R. 44 Mad. 891.
3. (1938) 1 M.L.J. 710.
4. L.R. (1924) A.C. 385.
5. (1911) 22 M.L.J. 23 : I.L.R. 35 Mad. 648.

"According to the Marumakkattayam Law, property is held by the members of a tarwad jointly without any right to compulsory partition and without any individual right of disposal so long as the tarwad continues to exist."

It should follow, therefore, that the tarwad is a permanent institution which continues to hold the property as distinct from the members that compose it. There can thus be no changing of hands in relation to such property. It is obvious further from what we have said that what the members of the tarwad are entitled to is only a claim to certain benefits out of the property and not to any specific share in the property itself. We are thus driven to the conclusion that it is not a case wh'ch would come within the scope of section 5 of the Estate Duty Act.

The learned Advocate-General, who further claimed that even section 6 of the Estates Duty Act would govern this case, did not amplify the argument. Section 6 provides :

"Property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death."

It is hardly necessary to reiterate what we have endeavoured to set out fairly clearly above, *viz.*, that no one member of a tarwad is capable of dealing with the property of the tarwad. That the members possess a community of property and that it is the tarwad as such which has the power of disposal over the property should be fairly clear. The absence of a right to partition should also lead to the consequence that no member can have any right of disposal. Section 6 can, as far as we can see, have no application whatsoever. Whether or not this section would become applicable to a case where the tarwad is not impartible need not be gone into.

The Department's case is that on the death of Kunhamina, her interest in the property ceased, and in such an event section 7 of the Act provides for the levy of estate duty, on such interest ceasing on the death of the deceased, it being deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cessor of such interest. The first part of the section is in these terms :

"*Section* 7 (1).—Subject to the provisions of this section, property in which the deceased or any other person had an interest ceasing on the death of the deceased shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cessor of such interest.... ."

Had this section stopped there, there would perhaps be very little scope for the argument that on the death of a person who forms a member of a family, of the nature we have earlier described, the cessor of the interest which the deceased person had in the property would by the very cessor thereof result in an enhancement or the enlargement of the benefits of the other members of the family in those properties and a benefit could therefore be held to accrue or arise by reason of the cessor of the interest of the deceased person. But the section proceeds

"...........including, in particular, a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Aliyasanthana Law."

According to the learned counsel for the petitioner, these are words of limitation and they indicate that it is only in the case of Hindu families governed by one of those laws that the section has been made specifically applicable. Support for this argument is sought to be derived from the succeeding sub-sections. Sub-section (2) of section 7 provides that if a member of a Hindu coparcenary governed by the Mitakshara school of law dies, it is only in certain stated circumstances that sub-section (1) would apply. Sub-section (3) is important in the present context and it may be set out in full :

"If a member of any tarwad or tavazhi governed by the Marumakkattayam Rule of Inheritance or a member of a kutumba or kavaru governed by the Aliyasanthana Rule of Inheritance dies, then the provisions of sub-section (1) shall not apply with respect to the interest of the deceased in the property of the tarwad, tavazhi, Kutumba or kavaru, as the case may be, unless the deceased had completed his eighteenth year."

The earlier part of this sub-section appears to be in very general terms and would normally include a tarwad, even a Moplah tarwad, governed by the Marumakkattayam rule of inheritance. But the learned counsel for the petitioner points out that notwithstanding the apparently broad sweep of the earlier part of the section, the latter part of sub-section refers to the provisions of sub-section (1) of section 7, which according to him excludes a Mohammadan tarwad governed by the Marumakkat

tayam Law. Reference has also been made to section 39 of the Act which deals with the valuation of interest in coparcenary property ceasing on death. Though the joint family ownership of tarwad properties may not strictly be styled as coparcenary interest, it is very closely analogous thereto. Section 39, sub-section (1) provides that in the case of the cessor of a coparcenary interest in any joint family property governed by the Mitakshara school of Hindu Law, the value of the benefit accruing or arising from such share shall be the principal value of the share in the joint family property which would have been allotted to the deceased had there been a partition immediately before his death. This has obviously specific reference to a Mitakshara joint family. Sub-section (2) is however more general, and would appear to apply even to cases of Moplah tarwads. It reads :

> " The value of the benefit accruing or arising from the cesser of an interest in the property of a tarwad or tavazhi governed by the Marumakkattayam rule of inheritance or of a kutumba or kavaru governed by the Aliyasanthana rule of inheritance which ceases on the death of a member thereof shall be the principal value of the share in the property of the tarwad or tavashi, or, as the case may be, the kutumba or kavaru which would have been allotted to the deceased had a partition taken place immediately before his death."

It is however the petitioner's case that this provision cannot lead to the conclusion that a Moplah tarwad comes within its scope. That according to him should still be determined on the basis of a proper interpretation of section 7 (1). As we have said, the attempt on the part of the learned counsel for the petitioner is to establish that the latter part of section 7 (1) which reads " including in particular, a coparcenary interest in the joint family property of a Hindu family......" is only intended to bring in a coparcenary interest in a joint Hindu family which would not otherwise have been brought within the scope of the earlier part of section 7 (1). In putting forward this argument, reference has been made to the scope of a corresponding provisions of the English Act. Section 2 of the English Act is in these terms :

> " *Section* 2 (1).—Property passing on the death of the deceased shall be deemed to include the property following ; that is to say :—
>
> (*a*) Property of which the deceased was at the time of his death competent to dispose ;
>
> (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which the deceased or any other person was only an interest as holder of an office, or recipient of the benefit of a charity, or as a corporation sole."

The provision corresponding to section 2 (1) (*a*) of the English Act is section 6 of the Estate Duty Act. Section 2 (1) (*b*) corresponds to section 7 (1) first part. The latter part of section 2 (i) (*b*) of the English Act is covered by sub-section 4 of section 7 and the *Explanation* thereto in our Act, which is almost in identical terms with the latter part of section 2 (1) (*b*). According to the learned counsel section 7 (1) of the Act is founded upon or closely follows section 2 (1) of the English Act in its scope and in its purport ; and consequently the inclusive part of section 7 (1) should have been intended to bring in a certain category of interest which would otherwise not have been within the scope of the earlier part of section 7 (1) which is the same as section 2 (i) (*b*). This argument necessarily calls for an examination of the scope of the latter part of section 7 (1) and what effect it has upon the earliest part of the same section.

Dilworth v. *Commissioner for Land and Income-tax*[1] has been relied upon in this context. That was a case where the expression 'includes' occurring in section 2 of the Charitable Duties Exemption Act, 1883, come in for consideration. That section was in these terms :

> " In this Act, the term ' charitable purposes ' includes devises, bequests, and legacies of real or personal property respectively of whatever description to public institutions such as " Libraries, museums, institutions for the promotion of science and Art, colleges and schools, or to hospitals, orphan, lunatic, or benevolent asylums, dispensaries."

Lord Whatson said :

> " The word ' include ' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute ; and when it is so used, these words or

1. L.R. (1899) A.C. 99.

phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word ' include ' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words of expressions defined. It may be equivalent to ' mean and include ', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

Learned Counsel for the Petitioner seeks to attach to the expression ' including ' occurring in section 7 (1) of the Act, the more restricted interpretation which is suggested in the latter part of the above extract. According to him, what is meant in the context in which this expression appears is that the chargeability attaches only to those interests which are more particularly specified in the inclusive part of the provision, *viz.*, only to joint family property of Hindu families governed by the Mitakshara, Marumakkattayam or Aliyasanthana Law. There are several enactments where the definition clause contains the expression 'to mean and include' in which even it may be regarded that an exhaustive explanation of the things intended to be caught in the net of the section is specified. But, where the expression is merely 'including, it does not seem to us that the expression is used to have a restrictive operation and to confine the scope of the section only to those things specified in the words following. Considering also that this is a taxation measure, which is intended to be quite general in its operation, a more reasonable construction to place upon this expression would to our minds be that it enlarges the meaning of the words or phrases occurring in the section. We are supported in our conclusion by the further exprdssion that is found in this very section itself. While the expression 'including' standing by itself might be possible of either of the two alternative interpretations suggested by Lord Watson, the particular phraseology employed in this provision in section 7 (1) which is 'including in particular ' compels us to adopt the interpretation which enlarges the meaning to be attached thereto. It is commonplace that every word and phrase occurring in a section must be given a meaning, and in particularising the coparcenary interest, the Legislature would appear to have intended only to remove any ambiguity which might otherwise be supposed to exist in the area of operation of the provision.

The expression 'in particular' came in for examination in *Padmanabhan* v. *The State of Madras*[1]. The question arose therein whether a rule framed by the State Government under section 68 (2) of the Motor Vehicles Act, IV of 1939 was within the scope of that provision. While section 68 (1) contained a general power for the framing of rules, section 68 (2) provided that

" without prejudice to the generality of the foregoing power, rules under this section may be made with respect to all or any of the following matters "........................

and proceeded to specify a list of items with respect to which rules could be made. The learned Judge referring to the rule of construction laid down by the House of Lords in *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Housing and Local Govt.*[2]. concluded that the particularisation of the matters contained in section 68 (2) of the Act was only intended to make it clear that the items enumerated therein do not limit or otherwise control the power conferred by section 68 (1) and that the enumeration in section 68 (2) only amounted to a statutory recognition that all of those items are within the scope of the generality of the power conferred by section 68 (1) of the Act. This decision fully supports the view that we have taken, *viz.*, that in particularising interests of a special character, the Legislature was not confining the operation of the section to those particular matters.

The interpretation placed upon the expression " includes " in *Dilworth* v. *Commissioner for Land and Income-tax*[3], has been followed in *Mellows* v. *Low and others*[4], where McCardie, J., also observed :

" In my view, the word ' includes ' as used in para. (*g*) is not a term of limitation or precise definition ; it means what it says that it includes the matters thereafter mentioned ; in other words, it is a word of enlargement rather than restriction............"

1. (1956) 1 M.L.J. 179 : I.L.R. (1956) Mad. 1272.
2. L.R. (1952) A.C. 362, 383.
3. L.R. (1899) A.C. 99.
4. (1923) 1 K.B. 522.

The next contention of the learned counsel is that in construing section 7 (1) of the Act, the contents of the other sub-sections of the Act should be taken into account. Sub-sections (2) and (3) provide for exclusion of certain cases. Sub-section (2) deals with the case of a Hindu coparcenary governed by the Mitakshara school of law. Sub-section (3), however, though it is expressed in general terms, capable of application to a tarwad governed by the Marumakkattayam Law. relates back to sub-section (1) and it provides that that sub-section shall not apply with respect to the interest of the deceased in the property of the tarwad unless the deceased had completed his eighteenth year. In putting forward the argument that there is no analogous provision to the case of a Mohammadan tarwad governed by the Marumakkattayam Law, learned counsel for the petitioner is really pursuing his interpretation of section 7 (1), *viz.*, that it should be confined in its operation to only the coparcenary interest in the joint family property of a Hindu family. In the view that we have taken of the scope of section 7 (1) this argument must necessarily fail. We have elsewhere pointed out that section 39 (2) of the Act is certainly comprehensive enough to include a Mohammadan tarwad governed by the Marumakkattayam rule of inheritance.

For this argument that the case where an interest of a deceased member of a joint family governed by the Marumakkattayam Law passes on his death would come within the scope of section 5 of the Act itself, an argument which we have not found it possible to concur in, the learned Advocate-General sought support in *Public Trustee* v. *Inland Revenue Commissioners*[1]. In this decision the House of Lords disagreed with the view taken by Lord Macnaughten in *Earl Cowley* v. *Inland Revenue Commissioners*[2], that sections 1 and 2 of the English Act were mutually exclusive and that if a case properly fell within the scope of section 1 in which event property in fact passes it is not necessary to resort to section 2 where by a statutory fiction property is deemed to pass this view was differed from by Viscount Simonds in the later decision. Though we have held in the view we have taken that the present case falls squarely within the scope of section 7 (1) and not under section 5, since the argument has been advanced on behalf of the Revenue, we have thought it necessary to refer to it.

Considerable reliance has been placed by the learned counsel for the petitioner on the fact that this joint family is impartible. Impartibility can however be no test whatsoever for the reason that the section itself does not in terms exclude interests in joint family properties which are by custom or by law rendered impartible. It is true that a coparcenary interest in the partible joint family property of a Hindu family is not the same as the interest of a member of a tarwad governed by the Marumakkattayam Law of inheritance the property of which is impartible either by custom or under law. But the interest of the members in the family except as regards the right to demand a partition is in no way different under the two rules of inheritance. A point almost similar in its scope arose in *Attorney-General* v. *Heywood and others*[3]. That was a case where by a settlement, the settlor assigned to trustees a sum of money together with interest, upon certain trusts and it was declared that the trustees should apply the income to the benefit of the settlor and his wife and children or at their discretion for the benefit of one or more of such persons to the exclusion of others. The power conferred upon the trustees actually extended to depriving the settlor of the benefit of the settled property at their discretion, though an interest in such property for life was reserved to the settlor. In essence, therefore, apart from such an interest, none of the beneficiaries was entitled to any portion of the corpus of the property itself. Nonetheless, it was held that on the death of the settlor, death duty became payable. Willis, J., observed :

> "The question is whether under the settlement of..........any interest was reserved to.... ....the settlor, for, if any interest was reserved to him, it was clearly a life interest, because it terminated on his death. The word 'interest' is capable of different meanings according to the context in which it is used or the subject-matter to which it is applied. If the contention for the Department is right nobody has any interest in the property at all, and yet the whole fund was to be held for the benefit of three clauses of persons—husband, wife and children ; and the sum of the benefits for all of these three classes taken together being the sum of three nothings would amount

1. (1960) 2 W.L.R. 203.
2. L.R. (1899) A.C. 198.
3. 1 E.D.C. 13.

to nothing, whereas on the other hand, it must necessarily comprehend the whole interest in the fund ...."

It, therefore, follows that notwithstanding the restraint upon partibility and separate enjoyment of the share of a member of the tarwad, he does possess an interest in the property. There is no doubt the absence of power in such a member to dispose of the property. But that is not equivalent to the same thing as to say that he is not possessed of an interest therein. Whatever interest such a person has in the property which ceases on his death is by a fiction statutorily enacted, deemed to pass, and the extent to which it passes is equated under the provisions to the benefit which accrues or arises by the cesser of such interest. While in the case of a person who is entitled to an actual share in the properties on partition, such an interest may be capable of definite appraisal an inchoate interest in a case where the member is not entitled to partition may be of lesser value. But that, as we have said, cannot be taken as denying the existence of any interest whatsoever in a member of such family. The very fact that all the members of a tarwad have a community of property leads to the irresistible conclusion that each and every member has an interest in such property.

It has next been contended that apart from the fact that in a case of this kind there is no passing of property, whether factual or by the deeming provision, there is in any event no benefit which accrues or arises by the cesser of the interest owned by a member of the tarwad. The right which a member of the tarwad possesses is undoubtedly an interest in property. It has been held in *Govinden* v. *Kannappu*[1], that

> " the right of a junior member to maintenance from the income of the properties of the tarwad is an incident of co-proprietorship in the property of the tarwad. It has been held to be an assignable and transferable interest. Therefore, it seems to me that such interest can be relinquished."

This decision did not deal with a tarwad which was impartible in its nature. There is no doubt that it has laid down the proposition that the member of a tarwad has an interest in property. It is impossible to say that this interest which is a tangible one reduces itself to nothing by reason of the death of the member. If it is a right in the property of the tarwad, as also held in *Manikkath Ammini Ammal* v. *Padmanabha Menon*[2], the cesser of that interest must necessarily enlarge the interests of the remaining members of the family and must, therefore, result in the conclusion that a benefit does arise to the other members of the family. In so far as the Estate Duty Act is concerned, it is immaterial to whom the interest of the deceased person passes. The only question is whether the cesser of the interest leads to the accrual of a benefit to some one or other person. If it does, then section 7 (1) of the Act is attracted. The argument to the contrary that there is no enlargement of the rights of the other members does not seem to us to be acceptable under the circumstances.

In the view that we have taken of the provisions, it follows that a Moplah tarwad governed by the Marumakkattayam Law of Inheritance, whether it is impartible by custom or statute, is brought within the scope of section 7 (1) of the Act. The contention of the petitioner that the proceedings taken under the ' provisions of the Act by the Estate Duty Authorities is without jurisdiction fails.

We must make it clear that we have confined ourselves only to the question whether section 7 (1) applies when a female member of an impartible Moplah tarwad dies. In our opinion it does. We are not called upon to decide nor do we decide how the interest of the deceased should be evaluated for the purposes of ascertaining the estate duty payable.

Had it been necessary to do so by an order of Court, we would have set aside the ' decision ' in the letter of the respondent dated 4th January, 1957. But there is no need for that, as the Department had offered to withdraw the letter. We have had to consider only the question whether the petitioner is entitled to a writ of prohibition, and we have held that he is not.

The rule *nisi* is discharged and the petition is dismissed with costs. Counsel's fee Rs. 500.

1. (1936) 71 M.L.J. 514. 2. (1911) M.L.J. 509 : I.L.R. 41 Mad. 1075.

This Petition having been set down this day for being mentioned in the presence of Mr. K. K. Venugopal, Advocate for the Petitioner and Mr. S. Ranganathan for Mr. C.S. Rama Rao Sahib, Special Counsel for Income-tax on behalf of the Respondent, the Court made the following ORDER :

Writ Petition No. 105 *of* 1957:—(Order of Court pronounced by the Hon'ble the Officiating Chief Justice.)—No doubt rule 7 (2) of the Rules framed to regulate proceedings under Article 226 of the Constitution prescribed maxima and minima for fees payable to legal practitioners in proceedings under Article 226 of the Constitution the prescribed minimum is Rs. 50—and the maximum is Rs. 250. In Writ Petition No. 105 of 1957 we fixed the counsel's fee at Rs. 500 in view of the special difficulties involved and the importance of the questions dealt with. Learned counsel for the peitioner urged that the allowable fee should not exceed Rs. 250 which is the limit prescribed by rule 7 (2). Learned counsel for the respondent invited our attention to rule 16 of Order V of the High Court Fees Rules, 1956, which deals with practitioners' fees in general.

Rule 16 provides :

"In case of special difficulty or importance or where the amount of work involved is unusually great, the Court may, on the application of a party, direct that a higher fee than would ordinarily be admissible under these rules be allowed to a party."

Learned counsel for the petitioner pointed out that there was no similar enabling rule under the rules framed to regulate proceedings under Article 226 of the Constitution. Order 5 also prescribes maxima and minima for proceedings in Court. To the extent specific maxima and minima have been prescribed, rule 7 (2) would exclude the operation of the maxima and minima prescribed in Order 5. But rule 16 of Order 5 will, in our opinion, govern proceedings under Article 226 of the Constitution also. There is nothing in those rules inconsistent with rule 16 of Order 5 to attract the operation of the principle that a special provision excludes the operation of a general provisions of law.

In our opinion, the Court has jurisdiction to fix a fee higher than Rs. 250 referred to in rule 7 (2). Our orders fixing the fee at Rs. 500 will stand.

P.R.N. ——— *Petition dismissed. Rule discharged.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM, MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

A.M.S. Mohammed Kasim .. *Petitioner**

v.

The Assistant Collector of Central Excise, Madurai Division .. *Respondent.*

Sea Customs Act (VIII of 1878) *as amended by Act (XXI of* 1955), *section* 167 (81)—*Applicability to contravention of section* 8 (2), *Foreign Exchange Regulation Act (VII of* 1947), *as amended by Act (VIII of* 1952)—*Foreign Exchange Regulation Act, section* 23-*A*—*Construction and scope of*—*If incorporates section* 8 (1) *and* (2) *in Sea Customs Act*—*Section* 186, *Sea Customs Act*—*If bar to proceedings under section* 167 (81) *when fine and confiscations have been levied by customs officers*—*Interpretation of Statutes*—*Incorporation by reference*—*Referential Legislation*—*Principles*—*Duty of Court*—*Fictions*—*Use of*—*General Clauses Act (X of* 1897) *sections* 6-*A*, 8, 26 *and* 28—*Applicability and scope of.*

Section 167 (81) of the Sea Customs Act, though introduced by amendment later than section 23-A of the Foreign Exchange Regulation Act would apply to a contravention of section 8 (2) of the latter Act. Section 23-A of the Foreign Exchange Regulation Act does not incorporate section 19 of the Sea Customs Act or any other provision of that Act, either expressly or by implication, or by means of any formula of the kind employed in English Statutes. Nor does it even incorporate section 8 (1) and (2) of that Act as part of the Sea Customs, Act, by any language of reference. What it really provides is that the restrictions under section 8 (1) and (2) are to be deemed to have been imposed under section 19 of the Sea Customs Act. The rest of that Act is made applicable in logical consequence, but another legal fiction is created, whereby, in the context of that, section 183 has to be

*Crl. R.C. No. 502 of 1959. (Crl. R.P. No. 482 of 1959). 15th April, 1960. (26th Chaitra, 1882, Saka.)

read with a verbal alteration. The language of section 23-A does not amount either to the inc poration of the Sea Customs Act into the Foreign Exchange Regulation Act or *vice versa*

N. Sampathu Chetty v. *Collector of Customs*, (1959) 2 M.L.J. 35 : I.L.R. (1959) Mad. 222, overruled.

Where certain provisions of an Act are, by means of a legal fiction, deemed to have been impos under the provisions of another Act, and the structure of that Act is thereby made applicable, it only an instance of referential legislation by means of a legal fiction and not of incorporation prop of one statute in another; and in giving effect to legal fictions, the Courts have necessarily to consid as real the consequences flowing from the imaginary assumption.

East End Dwellings Co., Ltd. v. *Finsburg Borough Council*, (H.L.), L.R (1952) A.C. 109 ; *Briti Transport Commission* v. *London County Council*, L.R. (1953) 1 Q.B. 736 ; *The Bengal Immunity Company Limited* v. *State of Bihar*, (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168 : I.L.R. (1955) Pat. 905 (1955) 2 S.C.R. 603 ; *Income-tax Officer, Bombay* v. *Bombay Dyeing and Manufacturing Company, Limited* (1958) 2 M.L.J. (S.C.) 182: (1958) 2 An.W.R. (S.C.) 182 : (1958) S.C.J. 1054 and *Jute and Gunn Brokers, Limited* v. *New Central Jute Mills, Ltd.*, (1959) S.C J. 529 : A.I.R. 1959 S.C. 569, relied on

Queen v. *Smith*, L.R. (1873) 8 Q.B. 146 and *Secretary of State for India in Council* v. *Hindustan Co operative Insurance Society, Limited*, (1931) 61 M.L.J. 864: L.R. 58 I.A 259 : I.L.R. 59 Cal. 55 (P.C.) explained.

Case-law English and Indian discussed and reviewed.

Section 186 of the Sea Customs Act does not preclude proceedings under section 167 (81) in cases where the customs officers have levied the penalties of confiscation and fine.

No question of double jeopardy would arise in such cases as contemplated by Article 20 (2) of the Constitution of India.

Sections 182 to 186 of the Act form a related group, dealing broadly with " civil " penalties, while section 167 concerns those offences under the Act which are not to be dealt with by officers of customs who take cognizance of them under section 182 but to be tried by a Magistrate.

Bowes, In re., (1950) 2 All E.R. 1043 ; *R.* v. *Sethna*, (1957) All E.R. 286 ; *Holvering case*, (1938) 82 Law Edition 917 (United States) ; *Maqbool Hussain* v. *State of Bombay*, (1953) S.C.J. 456 : (1953) S.C.R. 730 : (1953) 2 M.L.J. 113 : (1953) An.W.R. (Supp.) 84 : A.I.R. 1953 S.C. 325.

Leo Roy Frey v. *Superintendent, District Jail*, (1958) S.C.J. 301: (1958) M.L.J. (Crl.) 289: 1958 S.C.R. 822: A.I.R. 1958 S.C. 119 ; *Sivagaminatha Moopanar* and *Sons* v. *Income-tax Officer, Madurai*, (1955) 2 M.L.J. 477 : I.L.R. (1956) Mad. 415 and *Venkataraman* v. *Union of India*, (1954) S.C.J 461, referred to.

Crais on " Statute law " 5th Edition, page 385; Maxwell on " Interpretation of Statutes ", 10th Edition, page 406 ; Ilbert's "Legislative Methods and Forms" 1901 Edition, pages 254, 259 and 260, cited.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Additional Sessions Judge of the Ramanathapuram Division at Madurai, dated 22nd April, 1959 and passed in C.A. No. 39 of 1959 [C.C. No. 306 of 1958, Sub-Divisional Magistrate's Court, Ramanathapuram).

S. Mohan Kumaramangalam, V. Venkatesan and *C.F. Louis*, for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*), for The Public Prosecutor on behalf of the State.

Order of Reference to Full Bench :

Somasundaram, J.—The petitioner was tried by the Sub-Divisional Magistrat of Ramanathapuram for offences under section 167 (81) of the Sea Customs Ac and section 8 (2) read with section 23 (*b*) and section 23 of the Foreign Exchang Regulation Act, VII of 1947, and sentenced to six months' rigorous imprisonme for the offence under section 167 [81) of the Sea Customs Act and for a similar te for the offence under section 8 (2) read with section 23 [*b*) of the Foreign Excha Regulation Act, the sentences to run concurrently. In appeal the conviction sentence for the offence under section 8 (2) read with section 23 (*b*) of the Fo Exchange Regulation Act were set aside but the conviction and sentence fo offence under section 167 (81) of the Sea Customs Act were confirmed.

The circumstances under which the petitioner was tried and convicted are ese : The petitioner was a passenger bound for Ceylon. He came to the customs ggage shed at Dhanushkodi pier on 5th February, 1958, for embarkation. He ade a declaration in Exhibit P-1 that he had only Rs. 10 in Indian Currency tes. P.W. 1, the Inspector, Central Excise, Dhanushkodi, examined the baggage d found that he had no dutiable articles. But P.W. 2, the Deputy Superintendent Police, who had information that the accused was carrying currency notes, followed m and questioned him. He gave the Deputy Superintendent of Police, the same ply as he gave to P.W. 1 The accused was then wearing a cap and chappals. .W. 2 cut open one of the chappals and found two packets rolled in white paper serted in the chappal. He found 35 notes of Rs. 100 denomination in one packet nd 30 notes of similar denominaion in the other packet. Similarly he cut open the ther chappal (M.O. 2) and he found therein also two packets containing in all 65 otes of Rs. 100 denomination. There were thus 130 notes of Rs. 100 denomination und hidden in the two chappals. The cap of the accused was then cut open and .W. 2 found in the cap (M.O. 3) 130 currency notes of Rs. 100 denomination concealed around the cap between the card board padding and the outer fur of the cap. All these were seized and a mahazar Exhibit P-2 was prepared for the same. The mahazar was attested by P.Ws. 3 to 5. P.W. 2 also recorded a statement [Exhibit P-3) from the accused and it was attested by P.Ws. 6 and 7. It is doubtful whether this statement is admissible in view of the fact that it was an admission made to a police officer. The Deputy Superintendent also seized the railway receipt, Exhibit P-4. The accused did not show to the officer concerned any reserve bank licence to carry currency notes, to the above extent. The currency notes were confiscated and a penalty also was imposed though it is not clear from the judgment as to what penalty was imposed. Then the Assistant Collector of Customs on the authority of the Collector filed a complaint before the Sub-Divisional Magistrate for the offences mentioned above.

The accused does not deny the recovery of the currency notes from him but he denies that it was recovered in the manner alleged. In short, he says that without his knowledge, the currency notes were in his hand bag, and they were recovered from the bag. The lower Court very rightly rejected the defence and accepted the evidence of the prosecution and found that the notes were recovered in the manner alleged which clearly showed that the accused kept these things hidden. Undoubtedly, he intended to take these currency notes to Ceylon but before they could be taken they were seized from him. It is, therefore, clearly established on the facts that the accused did carry these currency notes hidden in the chappals and in the cap for the purpose of taking them to Ceylon. The trial Court convicted him as aforesaid, *i.e.*, for offences under section 167 (81) of the Sea Customs Act and section 8 (2) read with section 23 (*b*) of the Foreign (Exchange Regulation Act ; and as already stated, in appeal the conviction for the offence under the Sea Customs Act was confirmed, the accused having been acquitted of the other offence.

The main contention of Mr. Mohan Kumaramangalam who appears for the petitioner is that section 167(81) of the Sea Customs Act cannot apply to a contravention of section 8(2) of the Foreign Exchange Regulation Act. To appreciate this contention it is necessary to set out some of the provisions of the Foreign Exchange Regulation Act and also the Sea Customs Act. Section 8 of the Foreign Exchange Regulation Act, 1947, is as follows :—

" 8. *Restrictions on import and export of certain currency and bullion* :—(1) The Central Government may, by notification in the official Gazette, order that, subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed, bring or send into the States any gold or silver or any currency notes or bank notes or coin whether Indian or Foreign.

Explanation.—The bringing or sending into any port or place in the States of any such es as aforesaid intended to be taken out of the States without being removed from the ship or yance in which it is being carried shall nonetheless be deemed to be a bringing, or as the case e sending, into the States of that article for the purpose of this section.

(2) No person shall, except with the general or special permission of the Reserve Bank or t written permission of a person authorised in this behalf by the Reserve Bank, take or send out the States any gold, jewellery or precious stones, or Indian currency notes, bank notes or coin foreign exchange other than foreign exchange obtained from an authorised dealer."

There was another clause (3) which was as follows :—

"(3) The restrictions imposed by sub-sections (1) and (2) shall be deemed to have bee imposed under section 19 of the Sea Customs Act, 1878, without prejudice to the provisions section 23 of this Act, and all the provisions of that Act shall have effect accordingly."

This sub-clause (3) was deleted by Central Act (VIII of 1952) ; and instea ection 23-A was introduced which runs as follows :—

"23-*A*: *Application of Sea Customs Act*, 1878.—Without prejudice to the provisions of section 2 or to any other provision contained in this Act, the restrictions imposed by sub-sections (1) and (2 of section 8, sub-section (1) of section 12 and clause (*a*) of sub-section (1) of section 13 shall be deeme to have been imposed under section 19 of the Sea Customs Act, (VIII of 1878), and all th provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effec as if for the word 'shall' therein the word 'may' were substituted."

Section 19 of the Sea Customs Act is as follows :—

"19. The Central Government may from time to time, by notification in the Official Gazett prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontier as defined by the Central Government."

Section 167 (81) is as follows :—

Offences.	*Section of this Act to which offence has reference.*	*Penalties.*
81. If any person knowingly, and with intent to defraud the Government of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or which are chargeable with a duty which has not been paid or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid ; or if any person is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition or restriction as aforesaid or of any provision of this Act applicable to those goods.	General.	Such peron shall on conviction before a Magis trate be liable to imprisonment for any term not exceeding two years, or to fine, or to both.

"Nothing in the second column of the above schedule shall be deemed to have the forc of law."

This section 167 (81) was introduced by way of amendment by section 10 of Act (XXI of 1955). It is the contention of Mr. Kumaramangalam that section 19 must be considered to have been incorporated by virtue of section 23-A in section 8 of the Foreign Exchange Regulation Act; and this having been incorporated in the year 1952, any subsequent amendment of the Sea Customs Act—as in the presen case section 167 (81), cannot be read into the Foreign Exchange Regulation Act and in this view the conviction for the offence under section 167 (81) is unsustainable. In support of his contention he relies upon the decision of a Bench of this Court re ported in *Sampath* v. *Collector of Customs*[1]. The Bench consisting of Rajagop and Balakrishna Ayyar, JJ., has observed as follows at page 242 :

1 (1959) 2 M.L.J. 35 : I.L.R. (1959) Mad. 222.

" The language of section 23-A of the Foreign Exchange Regulation Act bars, in our opinion, eptance of the plea of the learned Advocate-General, that the provisions of section 8 (1) among ers of that Act were incorporated into the Sea Customs Act. It was really the provisions of the Customs Act as they stood in 1952, that were incorporated by reference to that Act into the reign Exchange Regulation Act by section 23-A thereof. "

In *Secretary of State for India in Council* v. *Hindustan Co-operative Insurance Society, d.*[1], the Privy Council observed at page 64 thus :—

" It seems to be no less logical to hold that where certain provisions from an existing Act have en incorporated into a subsequent Act, no addition to the former Act, which is not expressly made plicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible r the subsequent Act to function effectually without the addition. "

nd they held that the subsequent Amendment, which was in that case section 167 3), could not be read into section 8 (1) of the Foreign Exchange Regulation Act.

The learned Advocate-General who appears for the State contends that the iterpretation put by the Bench is not correct and he reiterates his contention that : is the provisions of section 8 (1) and (2) of the Foreign Exchange Regulation Act hat must be said to be incorported in the Sea Customs Act and this is the iterpretation to be given to the provisions of section 23-A of the the Foreign Exchange Regulation Act.

It seems to me that the contention of the learned Advocate-General is well-ounded and I am inclined to agree with him that it is the provisions of section 8 (1) nd (2)—in this case we are concerned only with section 8 (2)—that must be onsidered to be incorporated in section 19 of the Sea Customs Act by virtue of ection 23-A and not the other way about. As the decision relied upon by Mr. Kumaramangalam is by a Bench of this Court and as I do not agree with the view aken by that Bench, I am put to the necessity of directing the papers to be laid before my Lord the Chief Justice for orders as to reference to a Full Bench.

The question, therefore, which I would like to formulate for reference to the Full Bench is as follows :—

" Whether section 167 (81) of the Sea Customs Act does not apply to contravention of section (2) of the Foreign Exchange Regulation Act. "

Two other questions also have a been raised before me, one of which at least s undoubtedly a question of importance and I have been asked to include these questions also in the reference to the Full Bench. One of the questions raised arises n the construction of section 186 of the Sea Customs Act. Section 186 reads as ollows :—

" The award of any confiscation, penalty or increased rate of duty under this Act by an Officer f Customs shall not prevent the infliction of any punishment to which the person affected thereby s liable under *any other law*. (italics are mine).

What is meant by ' any other law '—does it mean law other than what is contained in the Sea Customs Act or whether it includes any other provisions of the Act.

In two decisions of the Supreme Court one in *Leo Roy Frey* v. *Superintendent, District Jail, Amritsar*[2], and the other in *Thomas Dana* v. *State of Punjab*[3], without the point being raised and discussed their Lordships simply confirmed the conviction under the Sea Customs Act after the goods were confiscated and penalty was levied. In as much as the point was never raised and decided and as the question is raised before me, it is contended by the learned Advocate-General that this question also being an important question of law may be referred for decision by the Full Bench. I would therefore formulate the question as follows :—

" Whether section 186 of the Sea Customs Act precludes proceedings under section 167 (81) he Sea Customs Act in cases where goods have been confiscated and penalty has been levied. "

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1. (1931) 61 M.L.J. 864 : L.R. 58 I.A. 289 : I.L.R. 59 Cal. 55 (P.C.)
2. (1958) S.C.R. 822 : A.I.R. 1958 S.C. 119. (1958) S.C.J. 301 : (1958) M.L.J. (Crl.) 474 : A.I.R. 1959 S.C. 375.
3. (1959) S.C.J. 699 : (195. M.L.J. (Crl.)

The third question which has been raised for the first time before me in revisi is one arising under the proviso to section 23 of the Foreign Exchange Regulatic Act. The proviso runs as follows :—

" Provided that where any such offence is the contravention of any of the provisions of this A or any rule, direction or order made thereunder which prohibits the doing an act without permissic no such complaint shall be made unless the person accused of the offence has been given an opportu nity of showing that he had such permission. "

In this case the lower appellate Court following the decision of the Bomba High Court has acquitted the accused of the offence under section 23 (*b*) of th Foreign Exchange Regulation Act. I do not think it necessary to refer this questio for decision by the Full Bench as the accused has been acquitted of that offence The trial Court finds that the accused did not have any Reserve Bank license or per mission. He must have been questioned about the license and he must have sai that he has no permission. Evidence has not been placed before me to establis that he has not been questioned. It is not likely that a complaint would have bee laid without ascertaining from him whether he has permission or license. The ver fact that he has not produced any such permission even during trial shows that h has no such permission. In these circumstances, I do not think it necessary to refe this question to the Full Bench.

Therefore, the two questions for reference to a Full Bench are the following :—

" (1) Whether section 167 (81) of the Sea Customs Act does not apply to contravention of section 8 (2) of the Foreign Exchange Regulation Act.

(2) Whether section 186 of the Sea Customs Act precludes proceedings under section 167 (81) of the Sea Customs Act in cases where goods have been confiscated and penalty has been levied."

The papers will be placed before my Lord the Chief Justice for Orders as to posting before a Full Bench.

In pursuance of the above order of reference the case came on for hearing before the Full Bench (*Somasundaram, Ramaswami,* and *Anantanarayanan, JJ.*).

S. Mohankumaramangalam and *C. E. Louis*, for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) for the Public Prosecutor for State.

The Opinion of the Full Bench was delivered by

Anantanarayanan, J.—This is a reference by our learned brother Somasundaram, J., upon two questions that arose in the course of the arguments before him in Criminal Revision proceedings. The first question referred to us is :

" Whether section 167 (81) of the Sea Customs Act does not apply to the contravention of section 8 (2) of the Foreign Exchange Regulation Act. "

The second question is :

" Whether section 186 of the Sea Customs Act precludes proceedings under section 167 (81 of the Sea Customs Act in cases where goods have been confiscated and penalty has been levied."

The two questions, though arising from the facts of the particular case, ar distinct, and have to be kept apart. It is not necessary to re-capitulate the facts for they have been sufficiently set forth in the order of reference of our learned brother, and, further, they are not essentially related to the problems which concern us in the reference, which are largely problems of law. I shall immediatel proceed to the first question of the reference.

Upon this aspect, we have had the considerable advantage of arguments b the learned Advocate-General based upon a research into the law and precedent relating to the topic of statutory incorporation by reference which is involved in th question. The main basis of the learned Advocate-General's argument is th Referential legislation is a very wide subject, of increasing importance in the pro feration of enacted law. But, obviously, this includes many forms, from bare c tion, reference, application, and application by means of legal fiction to statut incorporation. Incorporation is only a part of this wide sphere, and it is essen that the ambit of statutory incorporation should be clearly defined. In English and precedent, we see the ebb and flow of several ideas upon the topic, but m

ıd more, the Legislature and the Courts have attempted to define and elimit statutory incorporation. Either the *ipsissima verba* are set forth in the inrporating statute, or an almost unvarying formula is employed to indicate actual ıcorporation. But citation, reference and application stand on a different footing ltogether ; in recent statutes we see the two processes side by side. But statutory ıcorporation has certain incidents and legal consequences, which ought to be clearly istinguished, and which ought not to be invoked in matters of mere reference or pplication of the principles of one statute to another.

The matter arises in the following way. Section 8 of the Foreign Exchange .egulation Act, 1947, originally included clause (3), which ran as follows :—

> " The restrictions imposed by sub-sections (1) and (2) shall be deemed to have been imposed nder section 19 of the Sea Customs Act, 1878, without prejudice to the provisions of section 23 of ıis Act, and all the provisions of that Act shall have effect accordingly."

'his sub-clause (3) was deleted by Central Act (VIII of 1952). Section 23-A was ıtroduced by Act (VIII of 1952). It runs as follows :—

> " Without prejudice to the provisions of section 23 or to any other provision contained in this .ct, the restrictions imposed by sub-sections (1) and (2) of section 8, sub-section (1) of section 12 and lause (*a*) of sub-section (1) of section 13 shall be deemed to have been imposed under section 19 of the ea Customs, Act, 1878, and all the provisions of that Act shall have effect accordingly, except that ːction 183 thereof shall have effect as if for the word ' shall ' therein the word ' may ' were substiıted."

We shall, a little later, turn to section 183 of the Sea Customs Act where verbal change has been introduced by section 23-A. But, before this, it is necesary for us to note the provisions of sub-sections (1) and (2) of section 8, sub-section 1) of section 12 and clause (*a*) of sub-section (1) of section 13 of the Foreign Exchange Regulation Act, referred to above. It is not necessary to set forth these provisions *in xtenso*. But we may observe that under section 8, sub-section (1), the Central Government is empowered to impose restrictions on the import and export of certain currency and bullion (Gold and Silver) " by notification in the Official Gazette." Next, turning to sub-section (2) of section 8, it indicates that no person shall, except vith the permission of the Reserve Bank, " take or send out of India any gold or precious stones or Indian currency or Foreign Exchange." In other words, sub-section (1) requires a notification for its taking effect, while sub-section (2) of section 8 operates *proprio vigore*. Similarly, sub-section (1) of section 12 indicates that the Central Government may, by notification in the Official Gazette, prohibit the export of certain class of goods specified in such notification, except upon a declaration, etc. Sub-section (1) (*a*) of section 13 indicates that no person shall, except with the general or special permission of the Reserve Bank, " take or send any security to any place outside India." Here again, there is a contrast between section 12 (1) which equires a notification, and section 13 (1) (*a*) which operates *proprio vigore*. Turning our attention to section 23-A again, we note that these restrictions are to be deemed o have been imposed under section 19 of the Sea Customs Act, 1878 " and all the provisions of that Act shall have effect accordingly." In other words, the text of section 19 of the Sea Customs Act is not brought into this statute, nor are words employed to the effect that that section is to be read as part of the Foreign Exchange Regulation Act, 1947. What is enacted is that the restrictions imposed by the sections aforesaid are, by a legal fiction, to be deemed as imposed under section 19 of the Sea Customs Act, and the structure of that Act is to be applied to those instances n which the restrictions have been infringed, as a logical consequence.

We may immediately turn to the Sea Customs Act (VIII of 1878). Section 183 of that Act specifies that :

> " Whenever confiscation is authorised by this Act, the Officer adjudging it shall give the er of the goods an option to pay in lieu of confiscation such fine as the Officer thinks fit. "

learned Advocate-General points out that, even as this provision stands he Act in which it occurs, the word ' shall ' ought to be construed as ' may ' ertain cases. For, when we turn to section 167 of the Act, we find that goods le to confiscation under the schedule thereto will include counterfet currency

or obscene literature, and it could not have been the intention of the Legislatu that the person attempting to bring in or take out counterfeit currency should be en tled to its return. But, however this might be, there can be no doubt that, wh section 183 has to be invoked in consequence of the application of the Sea Custo Act to certain restrictions under the Foreign Exchange Regulation Act, by virt of section 23-A, the authority confiscating the goods is not at all bound to offer t option of a fine instead. I might conveniently add, in this context, that the necessi for the reference arose because of section 167 (81), a comprehensive penal provisio which was introduced by Act (XXI of 1955), that is long after Act (VIII of 195 which introduced section 23-A of the Foreign Exchange Regulation Act. Th argument before the learned Judge was that, in consequence of the incorporatio of the Sea Customs Act under section 23-A, and more particularly of section 19 that Act, section 167 (81) could not be read into the Foreign Exchange Regulatio Act at all, being subsequent to the incorporation. I may further note in this sam context that, under section 19 of the Sea Customs Act, the Central Government empowered, by notification in the Official Gazette, to

> " Prohibit or restrict the bringing or taking by sea or by land goods of any specified descriptio into or out of India. . . . . . ."

It is now time that the problem should be clearly set forth and discussed. A ver siminlar situation arose in the Bench decision of this Court in *N. Sampathu Chetty* v *Collector of Customs*[1]. That related to section 178-A (1) of the Sea Customs Ac which was incorporated in 1955, subsequent to the enactment of section 23-A o the Foreign Exchange Regulation Act (VII of 1947). In other words, the situatio and argument were both identical. The learned Judges observed at page 242

> " The langauge of section 23-A of the Foreign Exchange Regulation Act bars, in our opinion acceptance of the plea of the learned Advocate-General, that the provisions of section 8 (1) amon others of that Act were incorporated into the Sea Customs Act. It was really the provisions of th Sea Customs Act, as they stood in 1952, that were incorporated by reference to that Act into th Foreign Exchange Regulation Act by section 23-A thereof. "

The learned Judges then proceeded to cite a passage from *Secretary of State for Indi in Council* v. *Hindustan Co-operative Insurance Society, Ltd.*[2], a decision that we shal have occasion to analyse at some length, and relied upon that passage for th dictum laid down by them earlier. In his order of reference, Somasundaram, J refers to the same passage, and observes that he felt that there was substance in th argument of the learned Advocate-General that, if this is a case of incorporation a all, we must rather hold that the provisions of section 8 (1) and (2) of the Foreig Exchange Regulation Act have, on the contrary, been incorporated with section 1 of the Sea Customs Act, by virtue of section 23-A. As we shall see a little late a great deal could be said for this view upon certain grounds of logical propriet But, since it is largely upon the strength of the Privy Council decision in *Secretary State for India in Council* v. *Hindustan Co-operative Insurance Society, Ltd.*[2], that t argument itself is pressed, and it is certainly a leading case in this country upon t subject, we have to turn to it, before scrutinising the law and precedents in the Unit Kingdom.

Before I do so, I might briefly refer to two provisions of the General Clau Act of 1897, which are helpful in this context. Section 6-A of this Act lays do that where any Central Act or Regulation made after its commencement repe any enactment by which the text of any Central Act or Regulation was amen by the express omission, insertion or substitution of any matter, then, unless a d erent intention appears, the repeal shall not affect the continuance of any s amendment made by the enactment so repealed. Similarly, under section 8 of the General Clauses Act, where any Central Act or Regulation made after commencement of the Act, repealed and re-enacted with or without modifica any provision of a former enactment, it was laid down that references in any o enactment or in any instrument to the provision so repealed shall, unless a diffe

1. (1959) 2 M.L.J. 35 : I.L.R. (1959) Mad. 222.
2. (1931) 61 M.L.J. 864: L.R. 58 I I.L.R. 59 Cal. 55 (P.C.).

tention appears, be construed as reference to the provision so re-enacted. But is noteworthy that section 8 (1) is limited to the construction of references to re-ealed enactments, and is further subject to the proviso " unless a different intention ppears ". As the learned Advocate-General stresses, where there is actual incor-oration this would be evidence of a different intention, for it is the rule of law that

" Where a statute is incorporated by reference into a second statute, the repeal of the first statute y a third does not affect the second. " (*Per* Brett, L.J., in *Clarke* v. *Bradlaugh.*[1]).

Also *see* Craies " On Statute Law ", 5th edition, page 385. While on the General Clauses Act, I might further refer to section 28 which deals with the wide case of itation of enactments.

It may be of some interest and significance, before I proceed to *Secretary of State for India in Council* v. *Hindustan Co-operative Insurance Society, Ltd.*[2], and the circumstances of that decision, to assume that the question before us is one of incorporation, and not one of reference or application of one law by means of another, and then to discover whether the effect of section 23-A is not to incorporate sections 8 (1) and (2), etc., of the Foreign Exchange Regulation Act into the Sea Customs Act, as was actually contended before Somasundaram, J. The argument for this interpretation could be put in the following form. The Legislature states, in substance, by the enactment of section 23-A, that certain restrictions under sections 8 (1) and (2), etc., of the Foreign Exchange Regulation Act, are to be deemed to have been imposed under section 19 of the Sea Customs Act, 1878. Some of those restrictions require notification, others operate *proprio vigore*. Those notifications, already issued or to be issued, are to be deemed to have been issued under section 19 of the Sea Customs Act. By virtue of this legal fiction, all the other provisions of the Sea Customs Act are to be applied ; in other words, by the mandate of this section, the infringements of these restrictions are brought within the ambit of the Sea Customs Act, and the structure of that Act is made to apply in full force. If we look at the matter in this light, we see that it can be logically contended, with considerable propriety, that these sub-sections (1) and (2) of section 8, etc., are really incorporated with section 19, and that it is not *vice versa* as if the entire Sea Customs Act were brought into the Foreign Exchange Regulation Act. With regard to the modification of section 183, it could be argued that this really makes no essential difference. All that the Legislature here enacts is that, where the restrictions under sections 8 (1) and (2), etc., incorporated with section 19 of the Sea Customs Act, are to be dealt with by authority, the state of affairs is as though the obligation of the confiscating Officer to afford an option for payment of fine is non-existent. As I earlier observed, if this has to be necessarily construed as an instance of incorporation, such an interpretation seems to me to be not merely feasible, but more in accordance with the express intention of section 23-A. But, in this case, section 167 (81) introduced by a later amendment of the Sea Customs Act will, of course, apply to the contravention of section 8 (2) of the Foreign Exchange Regulation Act.

As is clear from a careful study of *Secretary of State for India in Council* v. *Hindustan Co-operative Insurance Society, Ltd.*[2], Chapter IV (section 69) of the Calcutta Improvement Act (Bengal Act V of 1911) provided that the trustees could make acquisition under the Land Acquisition Act of 1894, which their Lordships of the Judicial Committee termed the General Act, but introduced certain modifications of the provisions of that Act for the purposes of the Local Act, (Bengal Act V of 1911). Those modifications were contained partly in the body of the Act, and partly in a schedule attached. The amending Act (XVIII of 1911) provided an appeal to the Bengal High Court in certain cases, from the Tribunal, but there was no appeal to His Majesty in Council. But the Land Acquisition Act itself was amended by Act (XIX of 1921), giving in terms a right of appeal to the Privy Council. The question was whether this later amendment of the General Act affected the rights of appeal under the local Act. It is very important to note, with reference to the *ratio decidendi* of this case, which was

1. L.R. (1881) Q.B.D. 63.
2. (1931) 61 M.L.J. 864 : L.R. 58 I.A. 259 : I.L.R. 59 Cal. 55 (P.C.).

really an appeal from *Hindustan Co-operative Insurance Society, Ltd.* v. *Secretary State for India in Council*[1], that the Judicial Committee observed at page 65 :—

"Even if their Lordships had been forced to hold that the sub-section was incorporated in Local Act, they would, on the well recognised principle of *generlia specialibus non derogant* have com the conclusion that the provision of the local Code must prevail and that this appeal was barr

But the Judicial Committee also proceeded to rest their decision upon what t felt to be a more cogent objection to the contentions of the Secretary of State. T pointed out (page 63) that the sub-section was not part of the Land Acquisition A when the local Act was passed. When the Bengal Legislature adopted the provisio of the Land Acquisition Act in the local Act there was nothing to suggest that th intended " to bind themselves to any future additions which might be made to th Act (Land Acquisition Act) ". For, new provisions might have been added the Land Acquisition Act, which would be quite unsuitable to the local Code. T Judicial Committee then expressly observed that, under the circumstances, t was an instance of incorporation of certain provisions from an existing statute another statute, the provisions themselves not being reproduced *ipsissima verba*, b this being effected by a reference, for the purposes of convenience. The rule then stated from Craies " On Statute Law " which is the dictum of Brett, L. in *Clarke* v. *Bradlaugh*[2], earlier cited. Their Lordships observed :

" The independent existence of the two Acts is, therefore, recognised ; despite the death of t Parent Act, its offspring survives in the incorporating Act. "

Thus, upon the assumption that this is an instance of incorporation of an earli statute by reference, the decision is based upon the canon of interpretation cite But this does not help us to determine when precisely an Act may be said to inco porate another, either by a formula of reference or in any other manner, and ho this is to be distinguished from bare citation, application, or a reference for certa purposes falling short of incorporation. We have been taken through certain lat decisions in this country, but they are not helpful in this context. For instanc *Corporation of Calcutta* v. *O. Khattun*[3], the principle of *Secretary of State for India Council* v. *Hindustan Co-operative Insurance Society Ltd.*[4], was followed in the instan of section 475 of the Calcutta Municipal Act, adopting the provisions of the La Acquisition Act, as it stood on 18th July, 1923, prior to an amending Act. Hen a declaration issued in the language of old section 6 of the Land Acquisition A was held valid. In the recent decision of the Supreme Court in *Jethanand Betab State of Delhi*[5], the general principle is set forth both from Craies and Maxwell " (Interpretation of Statutes " (10th Edition, page 406), and the situation conside whereunder a later amending Act inserted new provisions in an earlier Act. Th Lordships held that where an earlier Act is amended by a later Act, it cannot said that the earlier Act applies, incorporates or refers to the amending Act. T earlier Act could not incorporate the later Act, but it could only be amended by We have to note two matters here, before we proceed further. Section 8 (1) of General Clauses Act which I set forth earlier, will only apply to save a refere in the case of repeal and re-enactment. For an instance of this, I might cite *State of Uttar Pradesh* v. *M. P. Singh, etc.*,[6] wherein their Lordships held th reference in the definition was to the Factories Act of 1934, but by virtue of sec 8 of the General Clauses Act, it had to be construed as a reference to the provis of the Factories Act LXIII of 1948. Secondly, the actual doctrine in Craies Maxwell appears to be limited to an instance of repeal of the earlier statute. it is true that the Judicial Committee observed in *Secretary of State for India in Coun Hindustan Co-operative Insurance Society, Ltd.*[4], that where :

" Certain provisions from an existing Act have been incorporated into a subsequent A addition to the former Act, which is not expressly made applicable to the subsequent Act, c deemed to be incorporated in it " (per Lord Westbury in *Ex parte St. Sepulchre.*[7].

1. (1929) I.L.R. 56 Cal. 989.
2. L.R. (1881) 8 Q.B.D. 63.
3. A.I.R. 1956 Cal. 123.
4. (1931) 61 M.L.J. 864 : L.R. 58 I.A. 259: I.L.R. 59 Cal. 55 (P.C.).
5. (1960) S.C.J. 68.
6. Since reported in (1960) S.C.J. 49 M.L.J. (Crl.) 416.
7. (1864) 33 L.J. (Ch.) 372.

We shall now turn to the precedents and the law and practice in the United ngdom. For it is here we see, most clearly, the evolution of those rules of cons- iction upon which statutory incorporation has been demarcated and defined, thin the wider ambit of the Referential Legislation. Two forces may be here en at work. Firstly, the incorporation proceeds by an almost rigid formula, with e exception of the single decision in *Queen* v. *Smith*[1], which we shall notice later. ther the *ipsissima verba* are preserved in the interpreting statute, or a form of refer- ce is used which admits of no ambiguity whatever. Secondly, there is a more d more marked disinclination to confuse mere reference, citation or application the legal principle of an earlier statute, with statutory incorporation proper. s early as Ilbert's "Legislative Methods and Forms" (1901 Edition, pages 254, 259 d 260) the learned author has pointed out the imperative necessity for dis- nguishing these different forms of legislative reference. Incorporation proper as defined by Lord Esher, M.R., in Re *Woods Estate.*[2]

"If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal fect of that, as has often been said, is to write those sections into the new Act just as if they had been ctually written in it with the pen, or printed, in it, and the moment you have those clauses in the ter Act, you have no occasion to refer to the former Act at all."

he earliest case recognising this principle was *Queen* v. *Merionethshire Inhabitants*[3]. t is noteworthy that, upon the facts of this case, 43 Geo. III Ch. 59 applied and xtended 13 Geo. III Ch. 78 "as fully and effectually as if the same and every part hereof were hereinafter repeated and re-enacted." Even so, it was argued before atterson, J., that section 1 of 43 Geo. III Ch. 59 did not completely incorporate he provisions of 13 Geo. III Ch. 78, but only provided for a lawful application of hose provisions. In other words, the distinction between legislative reference nd incorporation is apparent in this very earliest case.

I might next refer to *R.* v. *Brecon*[4]. Here again, the formula employed is "as ully and effectually to all intents and purposes as if they were herein repeated and enacted." After this, we have the curious case of In Re *Cherry's Settled Estates*[5] This was a case in which lands taken under 9 and 10 Vict.Ch.39 were, in all respects o be treated and considered as if they had been taken under 3 and 4 Vict. Ch.37, n instance of retrospective incorporation. The question was whether the Land lauses Act of 1845 which came in between must be held incorporated with the tter Act, and we find that the correctness of the decision in this case has been a rtile source of dissenting opinions in the later cases. It is a remarkable instance the difficulties arising from the interpretation of incorporating or incorporated atutes. I shall, for a moment, leave aside *Queen* v. *Smith*[1], which is really somewhat vay from the main line of these decisions. In re *Mills' Estate*[6], again is an instance which a very specific and unmistakable formula of incorporation is used with gard to the provisions of 3 and 4 Vict. Ch. 87 (1840). Here we find the dictum Lord Esher, M.R. in Re *Wood's Estate*[2], disapproving of the rule in *Re erry's Settled Estates*[5], expressly dissented from in *Jenkins* v. *Great Central ilway Co.*[7] Lord Coleridge, J., pointed out, upon the authority of *Boden* v. *ith and others*[8], that the repeal of a statute did not repeal such portions of the tute as had been incorporated into another statute.

In *R.* v. *Stepney Union*[9], we find an emergence of the difficulty that incorporation implication is a nebulous concept, hard to define or distinguish from other forms Referential Legislation. Cockburn, C.J., pointed out that the question whether eo. IV Ch. 40, repealed by 8 and 9 Vict. Ch. 126, was kept alive and incorporated implication in section 7 of 3 and 4 Vict. Ch. 54 could not be answered in the mative. He stated that he was not prepared to go to this length, and that he had siderable doubts upon this matter. A very recent case, to which the learned ocate-General has drawn our attention, is *British Transport Commissuion* v. *London ity Council*[10]. Evershed, M.R. pointed out that it would not be correct to say

.R. (1873) 8 Q.B. 146.
.R. (1886) 21 Ch. D. 607-615.
844) 6 Q.B. 342.
5, 666.
9) 117 E.R. 665, 666.
31 L.J. (C.H.) 351.
6. (1886) L.R. 34 Ch. 24.
7. L.R. (1912) 1 K.B. 1.
8. (1849) 18 L.J. (C.P.). 121.
9. L.R. (1874) 9 Q.B. 383.
10. L.R. (1953) 1 Q.B. 736.

that section 26 of the Act of 1921 could even be strictly termed an enactment " applying " section 17 of the Act of 1888 " to anybody or anything within the meaning of the Act of 1949." The facts here were that section 8 (2) of the Act of 1949 repealed *inter alia* section 17 of the Act of 1888, while section 26 of the Act of 1921 provided that section 17 of the Act of 1888 " shall apply in respect of appeals from the Railway Rates Tribunal." It is highly noteworthy and significant that the learned Judges held that this was not a case of incorporation at all, or even of the application of certain portions of one law for the purpose of another, but merely the creation of an identical right of appeal *mutatis mutandis*.

We may now turn to the exceptional case of *Queen* v. *Smith*[1]. That related to section 8 of the Wine and Beer Houses Act, which provided that all the provisions of Act 9 Geo. IV, Ch. 61 . . . . " shall have the effect with regard to the grant of certificates under this Act." The Court held that " the form used does *constructively*, though not expressly, say that the appeal sections shall be incorporated." This is the nearest case to our present facts, but, even here, the language appears to me to be far more specific and indicative of the intention to incorporate than with regard to section 23-A. I think that, on the contrary, an analysis of section 23-A will definitely show that it is not a case of statutory incorporation at all. *Queen* v. *Smith*[1], only comes into the picture to this extent ; though, in every other case, we have an almost unvarying or rigid formula of incorporation, this case does suggest that the orders of reference might be more oblique but still that the same effect of incorporation might be achieved.

The learned Advocate-General has further drawn our attention to the actual words of incorporation in a series of statutes in the United Kingdom. He desires to contrast them with other words of mere reference or application. A clear formula will be found in the following enactments :—

(1) (1890) 53 and 54 Vic. Ch. 70. " as if there were re-enacted in the body thereof."

(2) (1891) 54 and 55 Vic. Ch. 19 "as if herein re-enacted."

(3) (1947) 10 and 11 Geo. VI, Ch. 51 " section 40 (2). . . . . . shall be incorporated."

Similarly, in 6 and 7 Eliz. (1958) Ch. 63, section 5 of the Park Lane Improvement Act is to the effect that " the land clauses. . . . . are hereby incorporated with this Act. "

On the contrary, when we look at 10 and 11 Geo. VI, Ch. 51, Town and Country Planning Act (1947), we find instances of both incorporation and mere reference. A good example of this is section 16 of the High Ways Act, 1959, (7 and 8 Eliz. II Ch. 25), where instances of application by reference are also to be found. It is noteworthy, in this context, that in *F. N. Roy* v. *Collector of Customs, Calcutta*[2], their Lordships observed (at page 1156) " the only effect of section 3 (2) is to apply the Sea Customs Act to certain cases. " This was a provision very similar in purport and form to section 23-A, equally invoking section 19 and declaring that " all the provisions of that Act shall have effect accordingly. " The absence of any terminology indicating that the Supreme Court considered this to be a case of incorporation proper, is highly significant.

Against this background, we may turn to the analysis of section 23-A itself, and to certain recent decisions of the Supreme Court defining and dealing with legal fictions, and their consequences. The first point that I desire to make here is that section 23-A does not incorporate section 19 of the Sea Customs Act, or any other provision of that Act, either expressly, or by implication, or by means of any formula of the kind employed in the numerous English Statutes earlier referred to. Nor does it even incorporate sub-sections (1) and (2) of section 8, etc., as part of the Sea Customs Act, by any language of reference. On the contrary, what it provides is that the restrictions under those sub-sections are to be deemed to have been imposed

1. L.R. (1873) 8 Q.B. 146.
2. (1957) M.L.J. (Crl.) 684 : (1957) S.C.J. 734 : (1957) S.C.R. 1151.

under section 19 of the Sea Customs Act. The rest of that Act is made applicable in logical consequence, but another legal fiction is created whereby, in the context of that, section 183 has to be read with a verbal alteration. This is all that section 23-A does and I am unable to see how this language can amount either to the incorporation of the Sea Customs Act into the Foreign Exchange Regulation Act, or *vice versa*. If the incorporation of a statute is to be construed in a loose sense, and not to be distinguished from reference and application, such a view may be possible. But the authorities cited by the learned Advocate-General and a study of the relevant parts of the English Statutes placed before us, leaves me in no doubt that the Courts in the United Kingdom have practically uniformly made such vital distinctions and confined the instances of incorporation to those justified by the specific language employed. But, if this is to be taken as a case of incorporation at all, as I have earlier pointed out, it would be more logical and consistent with the intention evident from the language to hold that sections 8 (1) and (2), etc., were being incorporated by means of section 23-A with section 19 of the Sea Customs Act, so that the structure of that Act might thereby apply to those restrictions.

With reference to the interpretation to be placed on such words as " deemed to be, " and the effect of legal fictions in general, it is sufficient to note the following authorities. Cave, J., observed in *R.* v. *Norfolk County Council*[1], that when the words " seemed to be " were used it was an admission that a thing is distinct from another and not identical with it, but that nevertheless an identity was created by means of the legal fiction. In giving effect to legal fictions, the Courts have necessarily to consider as real the consequences flowing from the imaginary assumption, and the well-known and oft-quoted observations of Lord Asquith in *East End Dwellings Co., Ltd.* v. *Finsbury Borough Council*[2], exemplify this with pointed emphasis. Of the decisions of the Supreme Court upon this matter, I might refer to (1) *The Bengal Immunity Company Ltd.* v. *State of Bihar*[3], (2) *Income-tax Officer, Bombay* v. *Bombay Dyeing and Manufacturing Company Ltd.*[4], (3) *Jute and Gunny Brokers, Ltd.* v. *New Central Jute Mills Co., Ltd.*[5], which is the latest authority, and an instance of twin statutory fictions. The point here is that these decisions and principles have a bearing upon the interpretation of section 23-A in this sense. Where certain provisions of an Act are, by means of a legal fiction, deemed to have been imposed under the provision of another Act, and the structure of that Act is thereby made applicable, what we really have before us is an instance of Referential Legislation by means of a legal fiction, and not of incorporation proper of one statute in another. It is further a legal fiction whereunder section 183 (*a*) has also to be read differently with regard to the enforcement of restrictions under sections 8 (1) and (2), etc., as restrictions under section 19 of the Sea Customs Act, and the further provisions of that Act. The difficulty arising from the observations in *Secretary of State for India in Council* v. *Hindustan Co-operative Insurance Society, Ltd.*[6], does not appear to me to be substantial, or to be adverse to the interpretation I have sought to place on section 23-A, distinguishing it from strict instances of statutory incorporation. As far as that decision was concerned, it proceeded upon a definite assumption that the Land Acquisition Act of 1894, or a part thereof was incorporated, with modifications, by means of Bengal Act (V of 1911). Once this was held to be so, it appeared to follow from the canon of interpretation laid down in Craies " On Statute Law " (V Edition, page 385) that the repeal of the earlier Act could not affect the incorporated portions of the later Act, not expressly made applicable to the subsequent Act, could not be held incorporated with the subsequent Act. But the decision of their Lordships in the case could be rested upon the distinct and well-recognised ground referred to by them at page 65, and I do not take this decision as authority for the view that, even where the language does not warrant the inference of incorporation, the same consequences must follow. On the contrary, as I have made clear, if we hold that sections 8 (1) and (2), etc., of the Foreign Exchange Regulation

1. (1891) 6 L.J. Q.B. 380.
2. L.R. (1952) A.C. 109
3. (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168 : I.L.R. (1955) Pat. 905: (1955) 2 S.C.R. 603 :
4. (1958) 2 M.L.J. (S.C.) 182: (1958) 2 An. W.R. (S.C.) 182 : (1958) S.C.J. 1054.
5. (1959) S.C.J. 529 : A.I.R. 1959 S.C. 569.
6. (1931) 61 M.L.J. 864 : L.R. 58 I.A. 259 : I.L.R. 59 Cal. 55 (P.C.).

Act were incorporated with section 19 of the Sea Customs Act, further modifications of the Sea Customs Act would certainly be applicable to instances of the restrictions under the incorporated sections. Consequently, I am of the view that the Bench decision of this Court in *N. Sampathu Chetty* v. *Collector of Customs*[1], will have to be dissented from, upon its interpretation of section 23-A of the Foreign Exchange Regulation Act. With the greatest respect to the learned Judges who decided that case, I think that it could be contended, with even greater plausibility and force, that the provisions of section 8 (1) and (2) of the Foreign Exchange Regulation Act were really incorporated into the Sea Customs Act, particularly with section 19, reading the section (23-A) as one of incorporation by reference. But it seems to me to be, more accurately, an instance of the application of the provisions of another law by means of a legal fiction, not amounting to incorporation proper, as the language employed falls short of the justification for such an inference.

In result, therefore, I would answer this reference of Somasundaram, J., by holding that section 167 (81) of the Sea Customs Act, though introduced by an amendment later than section 23-A of the Foreign Exchange Regulation Act, does apply to a contravention of section 8 (2) of the Act.

I shall now turn to the second question referred to us, namely, whether section 186 of the Sea Customs Act has the effect of precluding proceedings under section 167 (81) of the Sea Customs Act, in cases where goods have been confiscated and penalty has been levied. The argument upon this aspect may be expressed in the following form. Section 186 is to this effect :

> " The award of any confiscation, penalty or increased rate of duty under this Act by an officer of Customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under *any other law.* " (Italics mine).

The reasoning is that the words " any other law " preclude, by necessary implication those other provisions of the Sea Customs Act, as set forth in the Schedule to section 167, under which persons are liable to be convicted before a Magistrate for certain infringements, the most compendious provision being section 167 (81). When we look at section 187 of the Act, we find that it enacts that

> " All offences against this Act, other than those cognizable under section 182 by officers of Customs, may be tried summarily by a Magistrate. "

It is sought to be argued that the language of section 186 and the manner in which the Schedule to section 167 has been constructed, enables us to draw this particular inference. Certain infringements are those which could be dealt with by officers of Customs, for which the civil penalties, if we may so term them, of confiscation, fine or increased rate of duty under the Act itself, could be properly imposed. Where these are imposed, under section 186, the offender may still be liable to be proceeded against under the penal provisions of some other statute, such as the Indian Penal Code, etc. But, those infringements which are punishable by proceedings before Magistrate under the Schedule to section 167 are distinct and separate. They should be dealt with under section 187 already cited. In brief, where a civil penalty of any kind under the Act is being imposed, the person cannot be also liable for the magisterial proceedings and penalties under section 167, including section 167 (81). Hence the words " any other law " will preclude criminal proceedings under section 167 (81) by indirect implication.

I have carefully considered this reasoning, which really depends upon a schematic analysis of the Schedule to section 167, in the light of the language of section 186, and under section 187. I have no doubt whatever that the argument is unsustainable, and it is clearly opposed to the scheme of the provisions themselves, and to the general principles of law applicable. The matter is quite unambiguous and simple, and it is sufficient to refer to a very few of the authorities, apart from the sections themselves.

When we scrutinise section 167 of the Sea Customs Act, and the Schedule thereto, two matters are immediately apparent. Firstly, certain sub-sections alone

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1. (1959) 2 M.L.J. 35 : I.L.R. (1959) Mad. 223.

relate to what might be termed infringements involving criminal proceedings before a Magistrate, and consequential penalties. The other offences specified all involve the civil proceedings of confiscation, civil penalty or forfeiture, to be levied by officers of the customs themselves. It is distinctly unfortunate that the expression 'offence' has been used in a loose sense throughout. Section 167 (81) which was introduced by Act (XXI of 1955), is a comprehensive clause dealing with various infringements for which a Magistrate may try the offender, and impose imprisonment or fine. But it will at once be equally apparent, secondly, that the civil penalties and the criminal penalties, so designating them for convenience, are not exclusively applicable, but may overlap in certain cases. For instance, section 167 (81) relates to certain prohibitions with regard to the importation or exportation of goods. Upon the same set of facts, under section 167 (72) the person may be liable for a false declaration in respect of such importation, or under section 167 (81), which is a very general and comprehensive section penalising the fraudulent evasion or attempt at evasion of any duty chargeable upon goods on which duty has not been paid, etc. Consequently, the argument is not tenable that the scheme of section 167 and its Schedule is such, as to create two sets of mutually exclusive offences, which cannot overlap under any circumstances.

On the contrary, as the learned Advocate-General points out, sections 182 to 186 form a related group, dealing broadly with the civil penalties, while section 187 concerns those offences under the Act which are not to be dealt with by officers of Customs taking cognizance of them under section 182 but to be tried by a Magistrate. When we scrutinise section 182 we see that, as a matter of abundant caution in this section which refers to adjudication of confiscations and penalties by customs officers, sub-sections (26), (72), (74), (75) and (76) have been specifically excluded. But, even here, the draftsmanship has not been complete; for the later provisions such as (76 (*a*)), (76 (*b*)), (77), (78) and (81) have not been included in this context as excepted which should have been done. Hence, since the scheme is such that the magisterial procedure and penalties relating thereto may very well overlap the infliction of the penalties of confiscation, etc. by officers of Customs, and these are not mutually exclusive categories, section 167 (81) has full force, wherever it is applicable. Section 186 relates to a totally different principle, and there is no inference whatever, by means of any implication, from the use of the words "under any other law", excluding proceedings under section 167 (81), in cases where the goods have been confiscated and civil penalty has been levied.

We may turn to the more general aspect, which reinforces the same interpretation, and totally excludes any doctrine of "double jeopardy" as applicable in this context. A very few citations will be sufficient to indicate this.

Both in the United States and in the United Kingdom, it appears to have been generally held that the imposition of a civil penalty, such as confiscation or seizure or a penal tax, by the administrative agencies employed to implement the law relating to income-tax, customs, etc., will not thereby absolve the transgressor from liability to criminal prosecution, if he is liable upon those identical facts. In other words, such imposition of civil penalties will not amount to a conviction and sentence under the criminal law in any sense, so as to attract the application of the doctrine of "double jeopardy". Reference might be made here to *R.* v. *Sethna*[1], and to the case of *Bowes*[2]. In the United States, we have the *Helvering case*[3], where the Court specifically stated that the penalties imposed by Congress to enforce the tax laws include both civil and criminal sanctions, and that "invocation of one does not exclude resort to the other". As far as Indian cases are concerned, I might refer to the following. In *Maqbool Hussain* v. *State of Bombay*[4], the Supreme Court held that, though the importation of gold in contravention of the rules constituted an 'offence' under section 167 (8) of the Sea Customs Act and under section 23 of the Foreign Exchange Regulation Act, 1947, the proceedings before the Sea Customs Authorities did not

1. (1957) All. E.R. 286.
2. (1950) 2 All E.R. 1043.
3. (1938) 82 Law Ed. 917.
4. (1953) 2 M.L.J. 113 : (1953) S.C.J. 456 : (1953) S.C.R. 730 : A.I.R. 1953 S.C. 325.

constitute a 'prosecution' nor did the order of confiscation constitute 'punishment'. Hence, a prosecution under section 23 of the Foreign Exchange Regulation Act before a Magistrate was not barred. Equally significantly, we have the Supreme Court decision in *Leo Roy Frey* v. *Superintendent, District Jail, Amristar*[1], where their Lordships expressed the matter in the following form, upon the construction of section 186 itself:

> "The proceedings before the Customs Authorities were under section 167 (8) of the Sea Customs Act. Under section 186 of that Act, the award of any confiscation, penalty or increased rate of duty under that Act by an officer of Customs does not prevent the infliction of any punishment to which the person affected thereby is liable under any other law. The offences with which the petitioners are now charged include an offence under section 120-B, Indian Penal Code. Criminal conspiracy is an offence created and made punishable by the Indian Penal Code. It is not an offence under the Sea Customs Act."

This is upon the true scope and interepretation of section 186 and it also explains why the Legislature used the words 'under any other law' in this context. This has nothing to do with section 187, which has to be given equal effect, and which relates to proceedings before a Magistrate in regard to infringements under sub-section of section 167 which are so triable. Those proceedings, where taken in respect of transactions for which confiscation, penalty, etc., have been levied by Customs Authorities, do not constitute "double jeopardy" in any sense. Upon the broad principles that criminal prosecutions may be launched in respect of transactions for which departmental penalties are levied by administrative authorities, reference might also be made to the Bench decision of this Court in *Sivagaminathamoopanar & Sons* v. *Income-tax Officer, Madurai*[2].

There is one other point, which does not directly arise from the reference, but which might be commented upon here, for the sake of completeness. Would it constitute 'double jeopardy', if a person is prosecuted both before a Magistrate under section 167 (81), in respect of a certain alleged offence or offences, and also under the Indian Penal Code, for instance, in respect of the same transaction under section 186? The answer to this would appear to lie in section 26 of the General Clauses Act (X of 1897) which lays down that

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

It may be also pertinent to observe here, with reference to Article 20 (2) of the Constitution, that, as pointed out by the Supreme Court in *Venkataraman* v. *Union India*[3], the provision under Article 20 (2) differs from the American doctrine of 'double jeopardy' which is wider in its ambit as, according to that doctrine, there may be jeopardy even though the person was not actually punished in the previous proceeding.

I hence conclude that this reference of our learned brother must be answered in the negative; section 186 of the Sea Customs Act does not preclude proceedings under section 167 (81) of the Sea Customs Act, in those cases where the Customs officers have levied the penalties of confiscation or fine.

We place on record our high appreciation of the able and lucid arguments of the learned Advocate-General, assisted ably by the learned Public Prosecutor and Mr. Mohan Kumaramangalam, learned counsel for the defence.

Reference answered.

This case coming on this day for hearing after the expression of the aforesaid opinion of the Full Bench, the Hon'ble Mr. Justice Somasundaram made the following

ORDER :—The decision of the Full Bench on the points of law raised by the petitioner is against the petitioner. On the merits there is absolutely no ground for

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1. (1958) S.C.J. 301 : (1958) M.L.J. (Crl.) 415.
289 : (1958) S.C.R. 822 : A.I.R. 1958 S.C. 119.
2. (1955) 2 M.L.J. 477 : I.L.R. (1956) Mad.
3. (1954) S.C.J, 461 : (1954) 1 M.L.J. 702 : 1954 S.C.A. 466.

interference as the evidence establishes the guilt of the accused. The only one question is the sentence. In view of the fact that the entire sum of Rs. 25,000 has been confiscated and a further penalty of Rs. 5,000 has been levied and paid by the petitioner, I do not think that the ends of justice require that he should be sent back to Jail. The sentence is therefore reduced to the period undergone.

P.R.N. ——— *Petition dismissed; Sentence reduced.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN, MR. JUSTICE JAGADISAN AND MR. JUSTICE SRINIVASAN.

The Collector of Tiruchirapalli .. *Appellant.**

v.

The Trinity Bank, Ltd., Tiruchirapalli and another .. *Respondents.*

Mortgages—Suit to recover a mortgage debt—Appointment of Receiver pending action to collect the rents and profits of the mortgage properties—Effect—Mortgagee, if entitled to a first charge over the collections—Crown debts—Priority—When could be claimed.

An order of appointment of a Receiver in an action by a simple mortgagee or an equitable mortgagee to recover the mortgage amount with a direction to him to collect and deposit to the credit of the suit the rents and profits from the hypotheca, but without an order of appropriation or allocation of the same in favour of the mortgagee, does not amount to a charging order in favour of the mortgagee over the said collections. Independently of an order of appointment of a Receiver a simple mortgagee or an equitable mortgagee or a charge holder in respect of an immovable property has no security over the rents and profits accruing from that property. The mortgagee can have no greater rights over such collection by reason only of such appointment of a Receiver. Hence such a mortgagee cannot claim priority over such collection in preference to Crown debts.

Maharajah of Pithaparuam v. *Gokuldoss Goverdhandoss*, (1931) 61 M.L.J. 111 : I.L.R. 54 Mad. 565 ; *Arunachalam Chettiar* v. *Ramanathan Chettiar*, (1934) 41 L.W. 495, and *Mohideen* v. *Nagu Bai*, (1939) 1 M.L.J. 730 : I.L.R. (1939) Mad. 496, overruled.

Rao Bahadur K. Sambasiva Chettiar v. *Secretary of State for India in Council*, (1940) 1 M.L.J. 429 and *Sanyasapanna* v. *Appalaswami*, (1953) 1 M.L.J. 496, conclusion agreed to and not the reasoning.

Soniram Rameshur v. *Mary Pinto*, (1933) I.L.R. 11 Rang. 467, followed.

Ma Joo Tean v. *The Collector of Rangoon*, (1934) I.L.R. 12 Rang. 437 ; *Ago G. Ally Ramzan Yezdi* v. *Balthazar and Son, Ltd.*, (1936) I.L.R. 14 Rang. 292 and *Adikeshavalu* v. *State of Madras*, I.L.R. (1957) Andhra Pradesh 505, dissented from.

The rule of priority of Crown debts can apply and be enforeceable only as between unsecured creditors of equal degree. The priority of the Crown cannot rank as against a secured creditor so as to deprive him of his security or to affect or injure his rights as such secured creditor.

Appeal against the Order of the Court of the Subordinate Judge of Tiruchirappali, dated 11th October, 1956 and made in I.A. No. 245 of 1956 in O.S. No. 268 of 1953.

The Advocate-General (*V. K. Thiruvenkatachari*), *C. S. Rama Rao Sahib* and *S. Ranganathan*, for Appellant.

K. S. Champakesa Ayyangar, *R. Ramamurti Ayyar*, *P. S. Srisailam* and *V. S. Ramakrishnan*, for Respondents.

When the matter came on for hearing in the first instance before him the following Order was made by

Basheer Ahmed Sayeed, J.—These Civil Miscellaneous Appeals raise the question as to whether the rents and other profits collected by a Receiver in a mortgage action could be claimed by the Income-tax Authorities as against the mortgagee. It is represented that there is no settled opinion about this and that there is actual conflict of decisions on the point as to who exactly will be entitled to the collections

*A.A.O. Nos. 120 and 103 of 1957 and C.R.P. Nos. 512 and 443 of 1957. 3rd March, 1961. (12th Phalguna, 1882, Saka).

made by a Receiver in such a mortgage action. The latest decision in *Adikeshavalu* v. *State of Madras*[1], seems to be in conflict with earlier decisions of two single Judges of this Court. There is no Bench decision of this Court on the point involved. The learned counsel on both sides request that this matter may be referred to a Bench so that the position may be once for all resolved and the conflict set at rest. These matters will therefore be placed before his Lordship The Chief Justice for necessary orders as to posting.

The appeals came on for hearing before a Bench (*Rajamannar, C.J.*, and *Veeraswami, J.*) who directed them to be posted before a Full Bench.

The appeals were then posted before a Full Bench (*Rajagopalan, Jagadisan* and *Srinivasan JJ.*)

The Advocate General (*V. K. Thiruvenkatachari*), *C. S. Rama Rao Sahib* and *S. Ranganathan* for Appellant.

K. S. Champakesa Iyengar, R. Ramamurti Ayyar, P. S. Srisailan and *V. S. Ramakrishnan* for Respondents.

The Judgment of the Court was delivered by

Jagadisan, J.—O.S. No. 268 of 1953 on the file of the Sub-Court, Tiruchirappalli, was a suit on a mortgage, dated 30th October, 1946, in which a preliminary decree was passed on 9th December, 1954. The decree-holder applied for the appointment of a Receiver in I.A. No. 12 of 1955 in respect of the mortgaged property to collect the rents and profits therefrom. By order of Court, dated 8th February, 1955, a Receiver was appointed. The judgment-debtor in that suit was assessed to Income-tax for the year 1955-56. On 13th February, 1956, the First Additional Income-tax Officer, Tiruchy, issued a certificate under section 46 (2) of the Indian Income-tax Act for the amount of tax due from the assessee and forwarded it to the Collector of Tiruchy. In I.A. No. 245 of 1956 the Collector applied to the Sub-Court, of Tiruchy for payment of the sum Rs. 235-10-0, by the issue of a cheque in favour of the First Additional Income-tax Officer, Tiruchy, from and out of the Receiver's collections deposited to the credit of the suit. This application was opposed by the assignee-decree-holder who had by then come upon the scene on the ground that the income from the hypotheca collected by the Receiver formed accretions to the hypotheca, and that such income was liable to be proceeded against in case the corpus was insufficient to satisfy the mortgage decree in full. The Collector of Tiruchy contended that the amount due to the Government by way of Income-tax levied on the judgment-debtor was a "Crown" debt, the payment of which can be enforced with a right of priority over other unsecured debts which may be owing by the assessee to others. The learned Subordinate Judge of Tiruchirappalli following the decision reported in *Paramasivan Pillai* v. *Ramaswami Chettiar*[2], held that though the mortgagee-decree-holder can proceed against the income realised by the Receiver only after exhausting his remedies against the hypotheca, the Government will have no right to proceed against such income at the present moment as the mortgage debt still remains undischarged. The learned Subordinate Judge was of the opinion that the Government can proceed only against the surplus that may be left in Court after the mortgage decree was fully satisfied. C.M.A. No. 120 of 1957 has been preferred by the Collector of Tiruchirappalli against the said order of the learned Subordinate Judge. The Collector has also preferred alternatively C.R.P. No. 512 of 1957 against the same order by way of abundant caution, lest it should he held that the order of the Court below is not appealable. C.M.A. No. 120 of 1957 and C.R.P. No. 512 of 1956 therefore go together, raising the question, whether the Collector of Tiruchirappalli is entitled to payment of the sum of Rs. 235-10-0 from and out of the Receiver's deposit to the credit of the suit, O.S. No. 268 of 1953, Sub-Court, Tiruchirappalli.

In O.S. No. 76 of 1948 on the file of the Sub-Court of Tirunelveli a decree in terms of a razinama entered into between the parties to the suit was passed on 18th

1. I.L.R. (1957) Andhra Pradesh 505. 915 (F.B.).
2. (1933) 65 M.L.J. 222 : I.L.R. 56 Mad.

April, 1952. The third defendant in that suit was Rao Bahadur P. Muthusami Reddiar. It is not necessary to refer to the nature of the suit or the reliefs prayed for therein, or to all the terms of the compromise between the parties. It is sufficient to refer to the following clauses in the compromise decree :

* * * * *

II. That third defendant do pay first plaintiff Rs. 1,00,000 (Rupees one lakh) with interest at 3½ per cent. per annum from this date by 17th October, 1952, besides the sum of Rs. 50,000 paid this day (18th April, 1952).

III. That the third defendant do pay second plaintiff Rs. 1,00,000 (Rupees one lakh) with interest at 3½ per cent. per annum from this date by 17th October, 1952, besides the sum of Rs. 50,000 paid this day (18th April, 1952).

VII. That in case of default in payment of the amounts due by third defendant by 17th October' 1952, the plaintiffs shall execute this decree and realise from third defendant the respective amounts so due with subsequent interest thereon at 6 per cent. per annum, *i.e.*, from 17th October, 1952, date of payment and that the properties in Alanganeri (Schedules I to IX-B) belonging to third defendant shall be a charge for the realisation of the said amounts and the plaintiffs 1 to 3 shall recover the same by enforcing the charge in this suit.

In the course of execution proceedings of this decree the decree-holders applied in E.A. No. 73 of 1955 for the appointment of a Receiver to take possession of the charged properties and to collect the rents and profits therefrom. The Receiver realised from the charged property a sum of Rs. 3,100 and deposited it in Court. The third defendant in the suit was assessed to Income-tax, and a sum of Rs. 30,000 was due from him by way of arrears of Income-tax levied. The Income-tax Officer, Tirunelveli, applied in E.A. No. 423 of 1956 to the Sub-Court, Tirunelveli, for the payment out of this sum of Rs. 3,100 in Court deposit towards the adjustment of the tax liability of the third defendant. Plaintiffs 1 to 3, the decree-holders, objected to this payment out and ressited the application. Plaintiffs 1 and 2 themselves filed E.A. No. 350 of 1955 on 18th October, 1955 for the issue of a cheque for the sum of Rs. 3,100 in their favour on the ground, that the Receiver's collections should enure in their favour. This application was opposed by the Income-tax Officer, Tirunelveli, who, as stated already, claimed the amount of Rs. 3,100 in Court deposit as due and payable to the Government which had a priority right in respect of the said amount. These two applications were heard together by the learned Subordinate Judge of Tirunelveli, who following the decisions of this Court in *Rao Bahadur K. Sambasiva Chettiar* v. *Secretary for State of India in Council*[1], and *Income-tax Officer, Salem* v. *Indian Insurance and Banking Corporation, Ltd., Salem*[2], held that the Income-tax Officer was entitled to the payment out as prayed for by him. He accordingly allowed E.A. No. 423 of 1956 and dismissed E.A. No. 350 of 1955. The petitioners in E.A. No. 350 of 1955 have preferred C.M.A. No. 103 of 1957 in this Court, challenging the correctness of the decision of the learned Subordinate Judge in dismissing their application. They have also filed C.R.P. No. 443 of 1957 against the order in E.A. No. 423 of 1956 issuing a cheque in favour of the Income-tax Officer, Tirunelveli. C.M.A. No. 103 of 1957 and C.R.P. No. 443 of 1957 therefore raise the question, whether the Income-tax Officer, Tirunelveli, is entitled to priority in the matter of payment out of the sum of Rs. 3,100 lying in Court deposit from and out of the realisations by the Receiver appointed in execution of the charge decree in O.S. No. 76 of 1948, Sub-Court, Tirunelveli.

The two C.M.As. and the two C.R.Ps. referred to above came on for hearing at the first instance before Basheer Ahmed Sayeed, J., who passed the following order on 12th February, 1959 ;

"These Civil Miscellaneous Appeals raise the question as to whether the rents and other profits collected by a Receiver in a mortgage action could be claimed by the Income-tax Authorities as against the mortgagee. It is represented that there is no settled opinion about this and that there is actual conflict of decisions on the point as to who exactly will be entitled to the collections made by a Receiver in such a mortgage action. The latest decision in *Adhikeshavalva* v. *State of Madas*,[3] seems to be in conflict with earlier decisions of two single Judges of this Court. There is no Bench decision of this Court on the point involved. The learned Counsel on both sides request

1. (1940) 1 M.L.J. 429.
2. (1953) 2 M.L.J. 496 : A.I.R. 1954 Mad. 197.
3. I.L.R. (1957) Andhra Pradesh 505.

that this matter may be referred to a Bench so that the position may be once for all resolved and the conflict set at rest. These matters will therefore be placed before His Lordship the Chief Justice for necessary orders as to posting."

Thereafter the appeals and the revisions were posted before a Division Bench consisting of the learned Chief Justice and Veeraswami, J. and their Lordships directed the posting of the cases before a Full Bench by their order dated 28th April, 1960.

In both these cases the claim of the Government is one for recovery of the amount of Income-tax levied and due and payable by the assessee who is the judgment-debtor in civil actions instituted against him by his other creditors. Such tax liability is undoubtedly a debt due to the Government by the subject on whom the tax has been imposed, and such a debt often goes by the name, 'a Crown debt'. A debt due to the Sovereign Government of the land carries with it a paramount preferential right to recover and realise the debt from the person liable to pay, the claim of the other creditors being postponed till after the Sovereign authority obtains payment in full. It is now settled law that the Crown or the Sovereign authority over the territory has priority, over creditors of equal degree, to payment out of the assets of a debtor which are distributed by a Receiver or an administrator.

"It is an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred." In re *Henley & Co.*[1] ; *The King* v. *Wells*[2].

This rule may be said to be the outcome of the maxim '*salus populi suprema lex*'; (Regard for the public welfare is the highest law). It is but natural that a debt due to the Crown, as representing the public at large, should be preferred to the debt of a single creditor. But this rule of priority in favour of the Crown for the realisation of its dues can only prevail and be enforceable as between unsecured creditors of equal degree, there being no question of any lien, charge, or mortgage in favour of one or another of such creditors. The priority of the Crown cannot rank as against a secured creditor so as to deprive him of his security or to affect or injure his rights as such secured creditor.

In *Soniram Rameshur* v. *Mary Pinto*[3], Leach, J. as he then was, held that where there are funds in Court belonging to the debtor the Court can order payment of a Crown debt due by the debtor on the application of the Crown. In that case the suit was one for recovery of an amount due on mortgage. A Receiver was appointed to take charge of the mortgaged premises and to collect the rents therefrom. The defendant was indebted to the Crown to the extent of Rs. 29-5-0 due under the Indian Income-tax Act. The Receiver who collected the rents of her mortgaged premises had sufficient moneys in his hand to pay the amount of income-tax due by the defendant. The Commissioner of Income-tax applied for an order directing the Receiver to pay him the sum of Rs. 29-5-0. The learned Judge quoted the following observation of Parker, C.B., in *The King* v. *Curtis*,[4].

"By the common law the King has a prerogative of preference in payment to all his subjects, and to be first satisfied ; the reason of it is given in *Sir William Herbert's case*[5], *Quia the saurus Regis est pacis vinculum et bellorum nervi.*"

"This preference which the King had by the common law, was the foundation of *Magna Charta*, c. 18, which was only declaratory of the common law."

At page 470 the learned Judge observed :

"This right to priorty has received recognition in India, as far as unsecured creditors are concerned."

In *Manikkam Chettiar* v. *Income-tax Officer, Madura South*[6], a Full Bench of this Court, consisting of Leach, C.J., Varadachariar and Mockett, JJ., held that the Crown is entitled to prior payment over all unsecured creditors and that there was no reason why the Crown should not be entitled to apply to the Court for an order direct-

1. (1878) L.R. 9 Ch. D. 469, 481.
2. 16 East. 278, 282 : 104 E.R. 1094.
3. I.L.R. 11 Rang. 467.
4. (1749) 145 Eng. Rep. 724.
5. 3 Rep. 12-b.
6. (1938) 1 M.L.J. 351: I.L.R. (1938) Mad. 744 (F.B.).

ing its debt to be paid out of moneys in Court belonging to the debtor without having to file a suit. In that case one Manikkam Chettiar obtained a money decree against one Govinda Rao, and in execution thereof attached and brought to sale some movable properties belonging to the judgment-debtor. The judgment-debtor was in arrears in the matter of payment of income-tax levied upon him and the Income-tax Officer applied to the executing Court under section 151, Civil Procedure Code, for an order directing the payment out to him from the sale proceeds, after the sale had taken place, of the amount due by the judgment-debtor for arrears of income-tax. The Full Bench held that the Crown was entitled to priority in respect of arrears of income-tax due to it, and the demand of the Income-tax Officer was not open to question. It was contended before the Full Bench on behalf of Manikkam Chettiar, the decree-holder who was pitted against the claim of the Income-tax Officer, that the attachment effected on the property brought to sale in execution of the decree placed him in the position of a secured creditor. This contention was negatived in view of a decision of a Full Bench of this Court in *Krishnaswamy Mudaliar* v. *Official Assignee of Madras*[1]. Leach C.J. specifically referred to his decision in the Rangoon High Court reported in *Soniram Rameshur* v. *Mary Pinto*[2], and observed thus :

> "I had occasion to consider this question in the case of *Soniram Rameshur* v. *Mary Pinto*[2], when sitting as a Judge of the Rangoon High Court, and, following the decision of Sale, J., in *Gayanoda Bala Dassee* v. *Butto Kristo Bairagee*[3], held that inasmuch as the Crown has priority over unsecured creditors in the payment of debts the Court can, on application and without a formal attachment being issued, order the payment of a Crown debt due by the debtor where there are funds in Court belonging to the debtor. The District Munsif referred to this decision in his order. The order which I passed in that case was passed by consent, and the only arguments were those addressed to the Court on behalf of the Crown, but the question has been fully argued before us to-day, and I see no reason for changing the opinion there expressed."

There can thus be no doubt that the Income-tax Officers in both the cases will be entitled to be paid out the amounts of tax due from the respective debtors from whose properties the respective Receivers have collected the rents and profits and deposited them into Court, if the fund in the Court is not already burdened with any lien or charge or mortgage in favour of the decree-holders or not earmarked or appropriated for the benefit of the decree-holders at whose instance the Receivers were appointed. What is the character of the money realised by the Receiver in the perception of rents and profits of the hypotheca from the charged property in his possession in a case where he is appointed in a suit commenced by the mortgagee or the charge-holder for the recovery of the amounts due to him? The answer to this question will afford a complete solution of the problem now before us. If the appointment of a Receiver in an action to enforce a mortgage or a charge cannot and does not enlarge the rights of the creditor by augmenting his security or by conferring further rights in his favour than what was created by the parties themselves under the terms of their contract or what enures in his favour by the operation of the substantive law governing the contract, the creditor cannot put forward any special right in preference to other simple money creditors of his debtor. In this view of the matter any debt due by the debtor to the Crown will of course have priority over the claims of all the other creditors of the debtor inclusive of the creditor who made the properties *custodia legis* by the appointment of a Receiver in enforcement of a mortgage or charge over the corpus of the properties. But if it were to be held that a Receiver appointed at the instance of a mortgagee or charge-holder and that the rents and profits emanating from the hypotheca and the charged property are also stamped with security in favour of the creditor he alone will be entitled to appropriate and adjust them towards his dues even in preference to a Crown debt, as the Crown has no priority over the secured claim against the debtor.

We shall first refer to the decisions cited at the Bar before dealing with the question of the legal effect of the appointment of a Receiver in an action to enforce

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1. (1911) 13 M.L.J. 278 : I.L.R. 26 Mad. 673 (F.B.).
2. (1933) I.L.R. 11 Rang. 467.
3. (1906) I.L.R. 33 Cal. 1040.

a mortgage or a charge. In *Ma Joo Tean* v. *The Collector of Rangoon*[1], a mortgagee obtained a mortgage decree against his mortgagors. During the pendency of the suit a Receiver was appointed by the Court at the instance of the mortgagee. The Receiver had in his hands moneys representing rents collected by him. The Collector of Rangoon claimed a sum of Rs. 1,029, being the amount of forfeiture imposed under section 19 (G) of the Court-fees Act, from the defendants and applied to the Court for payment of the sum out of the rents. A Division Bench of the Rangoon High Court, Sir Arthur Page, C.J. and Ba U,J., held that the rents and profits arising out of mortgaged land in the hands of a Receiver *prima facie* are not sums payable to the mortgagor, but form part of the mortgaged property upon which the debt due to the mortgagee was secured, and that the Crown is not entitled to be paid such rents and profits in respect of a debt due by the mortgagor to Government in priority to the party entitled to it, *viz.*, the mortgagee-decree-holder. The mortgage in the Rangoon case was in form an English mortgage, under the terms whereof the rents and profits arising out of the hypotheca formed part of the property hypothecated. The learned Chief Justice at page 442 referring to the form of the mortgage observed thus :

" In my opinion under the express terms of the deed of mortgage the mortgagee was entitled as a secured creditor of the judgment-debtor to the rents and profits of the land of which the Receiver was in possession."

On the facts of that case it is clear that the rents and profits of the mortgaged property constituted as much security for the repayment of the mortgage loan as the corpus of the property itself. A Receiver collecting such rents and profits could therefore hold the collections only as part of the security in favour of the mortgagee-decree-holder. The learned Chief Justice however posed the following question at page 441 :

" Are the sums in the hands of the Receiver representing the rents and profits of the land which was subject to the mortgage payable to the defendant, *i.e.*, the mortgagor ? "

and answered it thus

" In my opinion they are not."

The very object of appointing a Receiver in a mortgage action is to intercept the realisations of the rents and profits by the mortgagor and to prevent the mortgator from exercising any right or control over them. The sequestration of the income from the properties from the reach of the debtor cannot by itself transform its character or create new or fresh rights in respect of them in favour of persons who had no antecedent rights before the appointment of the Receiver. At page 444 the learned Chief Justice observed further as follows:

"...........I am disposed to think that the appointment of a Receiver by the Court under Order 40, rule 1, in no way diminishes or enlarges the title to the property which comes into his possession so far as the person otherwise entitled to it is concerned. It follows, therefore, that the sums of money in the hands of the Receiver are not sums payable to the mortgagor, but form part of the mortgaged property upon which the debt due to the mortgagee was secured."

All the observations of the learned Chief Justice in the Rangoon case were made in a context where the rents and profits realised by the Receiver were, by the express agreement between the parties, constituted as part of the security.

In *Rameshwar Singh* v. *Chuni Lal Shaha*[2], the first mortgagee filed a suit to enforce his mortgage making the mortgagors and the second mortagee defendants in the action. A Receiver was appointed at the instance of the plaintiff, the first mortgagee, the second mortgagee being a party to that application. The Receiver was directed under the terms of his appointment to collect the rents and other income from the hypotheca and to pay the realisations to the first mortgagee in reduction of his claim under the mortgage. The Receiver took possession of the mortgaged properties and carried out the order of Court for payment of the profits in reduction of the dues on the first mortgage. The second mortgagee, who was a party to the Receiver application and in whose presence the Receiver was

1. (1934) I.L.R. 12 Rang. 437. 2. (1919) I.L.R. 47 Cal. 418.

directed to pay the rents and profits in reduction of the liability under the first mortgage, instituted in turn a suit to enforce his security without joining the first mortgagee as a party. He obtained a decree and in due course of execution brought the hypotheca to sale and purchased it himself. The second mortgagee then made an application to the Court for the purpose of intercepting the whole of the income of the property purchased by him and to receive the amount for the satisfaction of his own dues. This application was opposed by the first mortgagee, and the question before the High Court was whether the second mortgagee was entitled to the order prayed for by him. The Calcutta High Court held that the second mortgagee was not entitled to the payment of the rents and profits asked for by him. The one thing which effectively precluded the second mortgagee from asserting any rights to the rents and profits of the hypotheca from the hands of the Receiver was an order of the Court dated 15th July, 1915, by which the Receiver was directed to pay the income only to the first mortgagee towards the reduction of the amounts due to him. The actual decision of the Calcutta High Court seems to us to rest entirely on the bar operating against the second mortgagee by reason of an order of Court to which he was a party. The second mortgagee contended that he was not bound by the previous order of Court, as subsequent to that order he obtained a decree on his own mortgage. In dealing with this contention their Lordships observed thus at page 423 :

> " We are of opinion that there has been no change in his position in relation to the Receiver at the instance of the first mortgagee. If neither the second mortgagee nor the mortgagor is entitled to question the propriety of the order for appointment of the Receiver, the circumstance that the equity of redemption has been transferred from the mortgagor to the second mortgagee cannot place the latter in a position of advantage. In his character as purchaser in execution of his own decree, he is as much bound by the order for the appointment of the Receiver as the mortgagor. If the mortgagor had made an application to the Court to modify the order for the appointment of the Receiver and had attempted to intercept the profits, no Court would have listened to him; the second mortgagee does not now stand in a different position ".

This is indeed the ratio of the decision of the Calcutta High Court, and this was enough for the actual decision in the case. But the learned Judges however observed thus at page 422 :

> " Our attention has been invited to the case of *Penny* v. *Todd*[1], where it was ruled that the possession of a Receiver in a mortgage suit was *prima facie* for the benefit of the party who had obtained the appointment. On this principle it has been argued that the Receiver who was appointed at the instance of the first mortgagee holds the property for his benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. In our opinion, this contention is clearly well-founded."

This observation was clearly obiter and even otherwise is very wide in its reach and scope.

In *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[2], the Maharajah of Pittapuram instituted a suit, Civil Suit No. 229 of 1924 on the Original Side of this Court, for recovery of the principal and interest due to him under a mortgage executed by one Gokuldoss, manager of a joint Hindu family trading under the style of Murlidoss Ramdoss & Co. The mortgage sued upon was an equitable mortgage created by deposit of title deeds of ten items of properties. One of the defendants in the mortgage action filed Civil Suit No. 622 of 1923 in the same Court against the other members of the firm Murlidoss Ramdoss & Co., for partition of the joint family properties. In the partition suit an Advocate of this Court was appointed Receiver of all the properties belonging to the joint family including the properties mortgaged to the Maharajah. Subsequently the firm was adjudicated insolvent and the Official Assignee was impleaded as the legal representative. The Receiver appointed by the Court continued in possession of the properties. The Maharajah made an application for the appointment of an independent Receiver for the properties mortgaged to him, but that prayer was not granted, and the Court merely directed the Receiver in the partition suit already appointed to keep a separate account of the income of the mortgaged properties. Eventually

1. (1878) 26 W.R. (Eng.) 502.
2. (1931) 61 M.L.J. 111 : I.L.R. 54 Mad. 565.

the Maharajah obtained a mortgage decree in his favour and brought to sale several items of the hypotheca. At that juncture two Advocates of this Court were appointed joint Receivers of the mortgaged properties, and these Receivers collected the income from the properties, subsequent to the date of the mortgage decree. The Maharajah claimed that the income realised from the mortgaged properties should in law be treated as additional security for the amount found due to him under the mortgage, inasmuch as a Receiver was appointed at his instance in his mortgage suit and as such the income from the properties should be considered to be ear-marked for his own use. The Official Assignee resisted the claim of the Maharajah and contended that with regard to the income the Maharajah had no preferential rights and that his rights to it are only the same as those of the ordinary creditors. Madhavan Nair, J., upheld the claim of the Maharajah and directed payment out in his favour. At page 572 the learned Judge observed thus :

> " Since the Receiver in this case was appointed at the instance of the petitioner and since he was not able to realise his decree amount by the sale of the mortgaged properties, it must be held that he is clearly entitled to proceed against the income in the hands of the Receiver as one of the steps for realization of his security."

At page 573 :

> "The right of an equitable mortgagee to get a Receiver appointed in a mortgage suit having been extended to a simple mortgagee, neither of them having any right to possession of the properties, I think his admitted right to proceed against the income of the mortgaged property in the hands of the Receiver for realising his debt, when the security is insufficient for that purpose, may also be extended to the case of a simple mortgage in India."

The learned Judge referred to the decision in *Rameshwar Singh* v. *Chuni Lal Shaha*[1], and relied upon the observations of the learned Judges of the Calcutta High Court extracted above. The principle laid down by this decision is that an order appointing a Receiver in a mortgage action at the instance of the mortgagee and entrusting him with the duty of realising the income from the mortgaged properties, does automatically by virtue of the force of the order of the appointment itself convert the realisations as belonging to the mortgagee to be appropriated by him for his dues.

In *Ponnu Chettiar* v. *Sambasiva Ayyar*[2], a Division Bench of this Court, Venkatasubba Rao and Reilly, JJ. considered the question of the effect of the appointment of a Receiver in a suit to enforce a simple mortgage. The appellant in the case obtained a money decree against one Ganapathia Pillai in the District Munsif's Court of Mayuram and in execution of that decree attached certain properties. The respondent who had obtained a mortgage from the aforesaid Ganapathia Pillai filed a suit in the Sub-Court of Mayuram for enforcing his mortgage and obtained the appointment of a Receiver for the mortgaged properties, which included properties already attached by the appellant in execution of his money decree. The appellant applied for leave to execute his decree against the Receiver, executed his decree, brought the attached properties to sale and purchased them himself. The sale was also in due course confirmed. The appellant attempted to take possession and the respondent made two applications to the Court below, one to restrain the appellant from taking possession, and the other to continue the Receiver already appointed. These applications were granted. The respondent obtained a mortgage decree, brought the mortgaged properties to sale and a third party purchased them. Till the date of this sale the Receiver had realised a certain amount as income from the properties and paid the amount into Court. As stated already some of the properties had already been purchased by the appellant himself in his execution sale. The appellant applied to the Court below for payment out to him of that part of the amount paid by the Receiver into Court attributable to the properties purchased by him on the ground that the ownership of the income was incidental to the ownership of the property. This application was rejected by the Court below and the correctness of this decison was challenged in

1. (1919) I.L.R. 47 Cal. 418. 546.
2. (1932) 64 M.L.J. 682 : I.L.R. 56 Mad.

the appeal. This Court confirmed the order of the Court below. At page 549 Venkatasubba Rao, J., observed thus :

"The effect of the order appointing the Receiver was to deprive the mortgagor of his right to deal with the income. It was in order to safeguard the respondent's position that the Receiver was appointed. The mortgagor could not defeat the order by assigning the profits to a third party. Could he have, for instance, by private transfer, assigned the income to the appellant ? Of course, not. What the appellant purchased was no more than the right, title and interest of the mortgagor. But the latter himself had no right to dispose of the income. The order operated to take away that right, which, otherwise, he would have possessed."

Venkatasubba Rao, J., referred to the decision of Madhavan Nair, J., in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[1], and observed thus :

"...........it is doubtful whether the decision of Madhavan Nair, J., in *Maharajah of Pithapuram* v. *Gokuldoss Goverdhandoss*[1], is correct or not, for the claimant, whose right was negatived by the learned Judge, was the Official Assignee ; but with that I am not concerned."

Reilly, J., at page 556 observed :

" But I do not think there is any reason to doubt that a simple mortgagee in this country cannot by getting a Receiver appointed in the course of a suit enlarge his security or enlarge his rights to the prejudice of third parties, who have already acquired rights in the equity of redemption."

At page 557 :

"......a judgment-debtor cannot deal with property for which a Receiver has been appointed so as to defeat the order appointing the Receiver or prejudice a judgment-creditor at whose instance the order has been obtained."

This decision only laid down the principle which is indeed well settled, that the order appointing a Receiver whatever may be the nature of the action in which the Receiver happens to be appointed operates as an injunction against the parties to the suit, their agents and persons claiming under them from interfering with the possession of the Receiver in any manner so as to affect the rights of the parties in the pending action.

We shall now refer to the decision of the Full Bench of this Court in *Paramasivan Pillai* v. *Ramasami Chettiar*[2] which, of course, did not deal with the question of the effect of the appointment of a Receiver in a suit to enforce a simple mortgage but which merely dealt with the question whether a Receiver can be appointed in a mortgage suit at the instance of the mortgagee, where the mortgagee had lost his personal remedy against the mortgagor. It is necessary to deal with this case at some length as several of the observations of the learned Judges of the Full Bench were commented upon by the learned Advocate-General appearing for the Income-tax Department, and as these very observations were relied upon strongly by learned counsels for the other creditors, Mr. K. S. Champakesa Iyengar and Mr. R. Ramamurthy Iyer. The facts of the case as set out by Ramesam, J., are as follows :

The first defendant in the suit, out of which the Letters Patent Appeal arose, executed a deed of mortgage in favour of one Krishna Pillai on 30th May, 1924 for Rs. 20,000. Krishna Pillai died and in the family arrangement entered into after his death between the members of his family, the mortgage document was allotted to the share of the plaintiffs and the seventh defendant in the suit. The third defendant in the suit was the son of the purchaser of the properties from defendants 1 and 2, the owners of the hypotheca under a sale deed dated 23rd February, 1959. Under that sale deed he undertook to pay the sum of Rs. 24,500 towards the mortgage debt. He offered to pay the said amount in full discharge of the mortgage, but the plaintiffs refused to accept it on the ground that more money was due to them. The result was the amount remained unpaid. On 29th September, 1930, a preliminary mortgage decree was passed in favour of the plaintiffs. The total amount declared to be due to the plaintiffs was very nearly the sum of Rs. 37,000. In August, 1931, the plaintiffs applied for the appointment of a Receiver of the suit properties on the ground that the properties were not of sufficient value for

1. (1931) 61 M.L.J. 111 : I.L.R. 54 Mad. 565.

2. (1933) 65 M.L.J. 222 : I.L.R 56 Mad. 915 (F.B.).

discharging the decree and that there was no other means of realising the decree amount. The Subordinate Judge passed an order appointing a Receiver and the Receiver took possession of the properties from 1st November, 1931. The third defendant preferred an appeal to the High Court against the said order, and Krishnan Pandalai, J., who heard the appeal reversed the order of the Subordinate Judge directing the appointment of a Receiver. A Letters Patent Appeal was preferred against the judgment of Krishnan Pandalai, J. and it was this appeal which was heard by the Full Bench. The short question for consideration by the Full Bench was whether it was open to the plaintiffs, who had given up their right to get a personal decree against the mortgagor, to apply to the Court for the appointment of a Receiver on the ground that the security was insufficient. In the ordinary course the mortgagee would have only sold the hypotheca and realised only such sum as the sale brought in and would have been without any remedy to recover from the mortgagor any deficit which may occur after adjusting the sale amount towards the mortgage decree. He could not proceed against any of the other assets of the judgment-debtor not included in the mortgage, as the personal remedy against the mortgagor was either barred or given up. The Full Bench held that it was open to the Court to appoint a Receiver in a suit on a simple mortgage even though the personal remedy of the mortgagee was not subsisting on the date of the institution of the suit. Ramesam, J., gave several reasons for holding that a Receiver can be appointed. The first reason as set out by the learned Judge was as follows at page 926 :

> "But where a mortgagee seeks to obtain the appointment of a Receiver he does not proceed against the other properties of the mortgagor but wants to proceed against the mortgaged property itself. The underlying idea in the opposite view is that, the profits of the property not being mortgaged, the mortgagee is really trying to proceed against property other than the mortgaged property. But if the idea is carefully examined it seems to me there is a fallacy. In the first place the mortgagee never seeks to obtain possession for himself. Secondly the attempt to place the property in the hands of the Receiver is really proceeding against the property so as to utilise it for the discharge of the debt. Now, profits of property are an accession to the property and proceed out of it."

The simple mortgagee is, as observed by the learned Judge, not entitled to recover possession of the mortgaged property from the mortgagor. The security of a simple mortgagee is only that of the property hypothecated and not the rents and profits therefrom. If so much is clear, we are unable to understand how the profits of property can at all be described as accession to the property by reason only of the fact that they emerged from out of the property. The second reason given by the learned Judge was thus set out by him at page 927 :

> "If a decree is promptly passed and the property is sold, the amount realised by the sale goes to the benefit of the mortgagee and from the time he receives the amount he gets interest in it. But instead of the sale promptly following the suit if there is delay, during all the time the sale is delayed the mortgagor will be enjoying the profits of the property which would have been enjoyed by the mortgagee in the shape of interest on the mortgage money if there had been an early sale. The profits of the property correspond to the interest on the money when once it is sold and converted into money; and wherever the mortgagor does not keep down the interest, he is really enjoying the profits of the property which in one sense represent the property which would have belonged to the mortgagee but for the delay."

Delay in proceedings before the Court arises out of the exigencies of the business of the Court. The rights of the parties to the suit can in no way be affected or be made to depend upon promptness and diligence of the one suitor or the dilatoriness and delay of the other suitor. The underlying conception in the remarks of the learned Judge seems to be that the mortgagor should not prejudicially affect the mortgagee's rights in the matter of the recovery of his money by indulging in what may be called delaying tactics. It may be that the mortgagee can legitimately look to the process of Court for the speedy realisation of the debt due to him. Until the hypotheca is sold the mortgagor, the undoubted owner of the property, is entitled to be in possession, and there is nothing improper and unjust if he were to enjoy the rents and profits himself. It cannot be said that by so doing he is fattening at the expense of the mortgagee. The mortgagee is entitled to interest on the mortgage amount throughout the proceeding in the suit, and we do not see how his interest can be said to be affected by reason merely of the pendency of

the mortgage action for an inordinately long time. If the hypotheca was insufficient either from the inception of the mortgage or by reason of other circumstances as fall in the value of the property, it is only the misfortune of the mortgagee for which the mortgagor cannot be made to suffer by the deprivation or diminution of his undoubted rights in the property.

The next reason of the learned Judge is thus set out at page 931 :

"The appointment of a Receiver is only a mode of execution (section 51 of the Code)—to be used, no doubt, with caution and sound judicial discretion. It was ordered by the Judicial Committee in a simple money decree; *Vibhuda Priya* v. *Lakshmindra*[1]. Why should the simple mortgagee be in a worse position than the holder of a money decree ? If it is said that he has taken property as security what about the case when it has become insufficient ?"

With respect we are unable to agree with this observation. A Receiver can be appointed under the provisions of the Civil Procedure Code even during the pendency of the suit long before the stage of execution is reached. Where a Receiver is so appointed even before the passing of the decree it cannot be a mode of execution. Assuming however that though a Receiver is appointed before the passing of the decree the adjustment of the income realised towards the decree can appropriately be called a step in execution or a mode of execution, the learned Judge failed to keep in mind the fact that a simple mortgagee who had lost his personal remedy and who had no security over the rents and profits of the hypotheca had no right to realise the rents and profits in execution of the mortgage decree. A simple money creditor however stands on a different footing. He can proceed against all the assets of the judgment-debtor as long as such assets are avilable for him to be proceeded against. Any comparison between a simple mortgagee who has lost his personal remedy against the mortgagor and a simple money creditor may not be quite apposite in considering the question either of the propriety of appointing a Receiver in such cases or the question of the legal effect of the order of such appointment.

Cornish, J., at page 948 made the following observation :

"The remedy of the simple mortgagee is a judicial sale of the mortgaged property ; *Sri Raja Papamma Rao* v. *Sri Vira Pratapa H. V. Ramachandra Razu*[2]. That is a legal remedy. In the absence of any clear rule to the contrary why is he not to be entitled to crave as auxiliary to his legal remedy the equitable remedy provided by Order 40, rule 1, of the appointment of a Receiver ?"

The provisions of the Civil Procedure Code create only procedural rights which cannot come into play in the absence of substantive rights in favour of the party invoking the procedure.

This Full Bench decision is authority for the legal position, that the Court has got jurisdiction to appoint a Receiver in a suit for the enforcement of a simple mortgage by the mortgagee who might not have kept his personal remedy against the mortgagor intact and subsisting on the date of the suit. The correctness of this view does not arise for consideration in the case before us and we have necessarily to proceed on the assumption that it is a right decision, though if the matter were *res integra* we might have considered the question afresh. The Full Bench had not to consider the question whether the collections made by the Receiver became impressed with the same character as the mortgaged property itself. The course of reasoning adopted by the learned Judges was only a guide to reach the final conclusion that the Court had power to appoint a Receiver. Neither the implication of the decision nor the necessary consequences flowing from it can exclude the ascertainment of the correct legal position by us in this proceeding.

In *Aga G. Ally Ramzan Fezdi* v. *Balthazar & Son, Ltd.*[3], a suit was brought to recover the amount due under a mortgage created by a deposit of title deeds. On the day when the mortgage suit was filed at the instance of the mortgagee an order was passed appointing a Receiver to take possession of the mortgaged property

1. (1927) 53 M.L.J. 196 : L.R. 54 I.A. 228 : I.L.R. 50 Mad. 497 (P.C.).
2. (1896) 6 M.L.J. 53 : L.R. 23 I.A. 32 : I.L.R. 19 Mad. 249 (P.C.).
3. (1936) I.L.R. 14 Rang. 292.

and to collect the rents and profits accruing therefrom. The mortgagee had allowed his right to obtain a personal decree against the mortgagor to become barred by limitation. The hypotheca was brought to sale in execution of the decree, but the proceeds of the sale were not sufficient to cover the amount due under the mortgage. Between the date when the Receiver was appointed and the date upon which the sale took place the Receiver collected Rs. 5,067-10-0 as rents and profits due and owing in respect of that period from the tenants on the property. That sum was less than the amount due under the mortgage after deducting the proceeds of the sale of the property. The mortgagee applied for an order that the sum in the possession of the Receiver should be allocated to him. The mortgagor opposed the application and the question was whether the mortgagee was entitled to the amount. The Division Bench of the Rangoon High Court held that, apart from the express agreement a mortgagee by deposit of title deeds does not possess as part of the interest that is transferred to him under the mortgage the right to possession of the property or the right to the rents and profits accruing therefrom during the subsistence of the mortgage. But nevertheless the learned Judges upheld the claim of the mortgagee to appropriate the sum in the hands of the Receiver to the balance of amount due under the mortgage decree. At page 301, Page, C.J. observed thus :

"...........in equity the mortgagee's right to the sale proceeds is deemed to accrue from the date when he claims the right to enforce his security by filing a suit or a petition in that behalf."

Again at page 304 the learned Chief Justice made the following observation :

"But, in my opinion, it is consonant alike with reason and equity, if a mortgagee is diligent and applies that a receiver should be appointed and in the event he succeeds in the suit, that the rents and profits in the hands of the Receiver should be allocated to the mortgagee who during the period between the time when he filed the suit to enforce his security and the date of the sale has been deprived of the interest and profits which otherwise might have accrued to him if he had been in possession of the proceeds of the sale during that period. It is upon that ground and not upon the footing that a mortgagee by deposit of title deeds possesses a substantive right to the rents and profits of the property subject to the mortgage that the Courts in England from the earliest times have allocated to the mortgagee the rents in the hands of the Receiver that have accrued after the order appointing the Receiver was made."

It is but proper that the Court should work out the rights of the parties as far as possible as they stood on the date of the institution of the suit. But allowing the mortgagee to have interest on the mortgage amount till it is realised and permitting him to have the rents and profits from the hypotheca through the machinery of the appointment of a Receiver do not achieve that result. A simple mortgagee or other mortgagee similarly placed whose personal remedy is lost can only recover the mortgage amount by a judicial sale of the hypotheca. The analogy of English law cannot help us, as the Indian statute law of mortgage is of a different pattern.

In *Arunachalam Chettiar* v. *Ramanathan Chettiar*[1], the appellant in this Court obtained a simple money decree against his judgment-debtor. In execution of that decree he brought to sale and purchased the equity of redemption in a certain property. The sale was held on 15th April, 1929 but delivery was not effected till 5th January, 1930. The respondent in the appeal was a simple mortgagee of the same property and he sued to enforce his mortgage and obtained a decree on 5th November, 1927, to sell the property. He applied for the appointment of a Receiver in the mortgage action and obtained an order in his favour on 16th December, 1929, that is after the sale to the appellant but before the delivery. The Receiver harvested the crops on the lands and deposited the value of the proceeds into the Court. The appellant contended that the title to the lands vested in him from the date of the sale, 15th April, 1929, that the gathered crops did not form part of the mortgage security and that therefore he was entitled to the sum in Court deposit. This contention was however repelled. The learned Judges followed the decision of the Full Bench in *Paramasivam Pillai* v. *Ramaswami Chettiar*[2], and observed as follows :

1. (1930) 41 L.W. 495.
2. (1933) 65 M.L.J. 222: I.L.R. 56 Mad. 915 (F.B.).

"..........the only practicable principle seems to be that all proceeds from the land realised after the Receiver takes possession are to go to the credit of the mortgage debt and are not the property of the mortgagor or of the purchaser of the equity of redemption although he may have raised them."

In *Mohideen* v. *Nagu Bai*[1], the question for consideration was whether the holder of a money decree or an equitable mortgagee had a preferential right in the profits of the mortgaged properties where a Receiver had been appointed at the instance of the holder of the money decree in execution proceedings and also appointed to act in a suit instituted by the mortgagee to enforce his mortgage. A Division Bench of this Court, Sir Lionel Leach, Chief Justice and Madhavan Nair, J., held that the equitable mortgagee was entitled to preferential payment of the proceeds of the mortgaged properties as against the holder of the money decree. The learned Chief Justice based his decision on the following observation at page 501 :

" As an equiable mortgagee is entitled as against the mortgagor to the rents and profits of the mortgage security if it is insufficient for the discharge of the mortgage debt and as the holder of a money decree who obtains the appointment of a Receiver is not in the position of a secured creditor I am of the opinion that the equitable mortgagee has the better title when there is a contest between the two. I am of course referring to a case where the order of appointment contains no charge and the creditor merely stands in the shoes of his judgment-debtor"

Madhavan Nair, J. referred to his earlier decision in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[2], and referred, also to the observation of Venkatasubba Rao, J., doubting that decision, in *Ponnu Chettiar* v. *Sambasiva Ayyar.*[3] The observation of Madhavan Nair, J., in this decision explaining his previous decision gives the key to the proper interpretation of the learned Judge's view in this matter. At page 506 he observed thus :

"The question therefore reduces itself to one of interpretation of the order passed by the Court. In *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[2], besides referring to the arguments advanced on the general principles arising from the position of the decree-holder as equitable mortgagee, I drew attention also to the order of the learned Judge appointing the receiver—the only point that received and could receive attention at the hands of the learned Judges in the English cases already referred to. In that case the order stated that the Receiver 'shall pay the net receipts into Court to the credit of this suit', Civil Suit No. 229 of 1924, the suit instituted by the equitable mortgagee in which he eventually obtained a decree. It seemed to me that, according to this order, the money in the hands of the Receiver was not to be dealt with ' except in one way ' that is, except to put it to the ' credit of this suit ', which means to the credit of the mortgagee-decree-holder in the event of his success in the case, and to no one else. According to this interpretation it follows that the mortgagee-decree-holder in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[2], was in the position of a secured creditor as against the Official Assignee............"

In a case where the mortgagee can obtain a personal decree against the mortgagor once the hypotheca is exhausted and found deficient to satisfy the mortgage decree in full, the order of the appointment of a Receiver and the perception of the rents and profits from the hypotheca through his medium may be treated as an order of attachment before judgment which can avail the creditor once the personal decree is passed. In this view of the matter the observation of the learned Chief Justice is not explicable. The view of Madhavan Nair, J., that very much would depend upon the terms of the order appointing the Receiver is unexceptionable.

In *Sambasiva Chettiar* v. *Secretary of State for India in Council*[4], a Receiver was appointed over the mortgaged properties in an action to enforce a simple mortgage. An amount was due from the mortgagor to the Government in respect of kudi maramath which had accrued due before the appointment of the Receiver. The Collector filed an application praying the Court to pay the money due to the Government by direction to the Receiver to pay from and out of the collections made by him. The question for consideration was whether the debt due to the Crown was entitled to priority over the debt due to the mortgagee in respect of the amount recoverable from the income of the mortgaged property. Wadsworth, J., held that the appointment of a Receiver in a suit on a simple mortgage did not really enlarge

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1. (1939) 1 M.L.J. 730 : I.L.R. (1939) Mad. 496.
2. (1931) 61 M.L.J. 111 : I.L.R. 54 Mad. 565.
3. (1933) 64 M.L.J. 682: I.L.R. 56 Mad. 546.
4. (1940) 1 M.L.J. 429.

the scope of the mortgage, that the mortgagee had no charge over the rents and profits in the hands of the Receiver, and that the Collector was entitled to be paid in recognition of the priority of Crown debt. At page 431 the learned Judge after referring to *Maharajah of Pittapuram* v. *Gokuldoss Goverdhan Doss*[1], *Paramasivam Pillai* v. *Ramaswami Chettiar*[2], and *Khader Mohideen Sahib* v. *Nagu Bai*[3], observed thus :

" It is true that there are in these judgments phrases which give some colour to the theory that when a Receiver has been appointed the right of the mortgagee to a preferential lien over the rents in respect of his mortgage-debt to the extent to which it is not covered by the hypotheca, is based on the theory that the rents are regarded as being added to the security for the mortgage-debt. But it seems to me that this view is clearly erroneous and that it was not in fact the basis of the decisions in the three cases above referred to. In India at any rate a simple mortgage does not bind the rents and profits of the hypotheca. The appointment of a Receiver in a suit on a simple mortgage does not really enlarge the scope of the mortgage. The true nature of the proceeding is that the Court creates a machinery whereby the mortgagor is prevented from dissipating the funds which would normally be used to defray the interest on the mortgage the object of the machinery being simply to prevent the mortgagor from profiting by the law's delays. The Receiver collects the rents in the first instance for the benefit of the mortgagee against the contingency of the hypotheca being insufficient."

The decision of the learned Judge rests upon the simple ground, that the mortgagee has no charge over the rents and profits collected by the Receiver, and that at best he can occupy only the position of a simple money creditor in which case his claim will have to be postponed to the claim of the Crown.

In *Income-tax Officer* v. *Ind. Ins. and Banking Corporation*[4], the question raised was whether a Crown debt for income-tax due by mortgagor is payable on the application of the Income-tax Officer in priority out of the rents and profits collected by a Receiver appointed in a simple mortgage suit filed by the mortgagee. Mack, J., held that although such rents and profits can be held by the mortgagee in priority to other simple creditors, they cannot be appropriated by the mortgagee in priority over a Crown debt. At page 498 the learned Judge observed thus :

" The rents and profits collected by a Receiver appointed by a Court cannot strictly be regarded as property charged with the debt. Wadsworth, J., took the view that the Court gave preference to the mortgagee over the simple creditors, merely by way of justice and equity, to ensure that the mortgagee shall not be damnified by the protraction of the suit. I find it difficult to accept this as the basis for giving preference to the mortgagee over simple creditors, in view of the mortgagee being more often than not responsible for his own difficulties, in not suing on his mortgage earlier and his not bringing the property to quick sale. It is not always easy to lay down precise reasons to support every just and equitable principle laid down by the Courts. Mr. Nambiar urges that if the mortgagee is given a preferential claim to simple creditors, a Crown debt which is also in the category of an unsecured debt has no claims to priority. I am unable to agree. A Crown debt is not a secured debt in the sense that there is no specific property charged with its payment. It is given a privileged priority over other debts by judicial decisions and also under statutes......They occupy a special and privileged category of their own. It is only a secured debt, that is one in respect of a strictly specified security which can have priority over a Crown debt. I have no hestitation in agreement with Wadsworth, J., in holding that the rents and profits collected by a Receiver appointed by a Court in a simple mortgage suit in prosecution of an equitable remedy open to the mortgagee do not constitute part of the security as such. Although such rents and profits can be claimed by the mortgagee in priority to other simple creditors, they cannot be appropriated by the mortgagee in priority over a Crown debt."

With respect to the learned Judge, we find it difficult to follow his reasoning. The major premise of the learned Judge was that there is no security attached to the rents and profits. Upon that the only conclusion possible was that the mortgagee cannot treat the amount as having been ear-marked for him. If the learned Judge was right in holding that the mortgagee could claim a preferential right against the other simple money creditors such preferential right could also be enforced against the Crown. We are unable to see how any distinction can be made between a Crown debt and other simple money debts owing by the mortgagor.

In *Adikesava Chetty* v. *The State of Madras*[5] a simple mortgagee filed a suit to recover the mortgage amount and had a Receiver appointed for the mortgaged

1. (1931) 61 M.L.J. 111 : I.L.R. 54 Mad. 565.
2. (1933) 65 M.L.J. 222 : I.L.R. 56 Mad. 915 (F.B.).
3. (1939) 1 M.L.J. 730 : I.L.R. (1939) Mad. 496.
4. (1953) 2 M.L.J. 496.
5. I.L.R. (1957) A.P. 505.

property who collected the rents and profits from the mortgaged property and deposited them in Court. The State of Madras had a claim for a sum of Rs. 1,325-9-2 against the mortgagors in respect of sales tax and they filed an application in the mortgage suit for payment out to them of the said amount from and out of the rents realised by the Receiver. The mortgagee opposed the application but the learned Subordinate Judge before whom the application was made ordered payment out. The correctness of this order was questioned before the Andhra High Court and a Division Bench of that Court consisting of Subba Rao, C.J., as he then was, and Jagan Mohan Reddi, J., set aside the order of the Court below and negatived the claim of the State. After a review of all the cases referred to above Subba Rao, C.J., observed thus :

> " The law on the subject may now be summarised. An appointment of a Receiver in a mortgage action to collect rents of the mortgaged property and deposit the same to the credit of the suit is one of the equitable modes of proceeding against the mortgaged property itself. On the making of that order, the mortgagor is deprived of his right to possession and to collect the rents. Thereafter neither the mortgagor nor persons claiming under him such as the purchaser or a mortgagee of the equity of redemption can have a higher right than the mortgagor himself. So too, all creditors who have no prior mortgage or security over the property, can claim to have a right to the amounts reaslised in so far as the said amounts were necessary to discharge the mortgage debts for, in the case of unsecured creditors, they can only claim that amount in the shoes of the mortgagor and when the mortgagor himself has no right *a fortiori* they will have none. Whatever privileged position the Crown occupies, in a competition *inter se* among unsecured creditors it is settled law that the Crown is not a secured creditor, and therefore, it can only claim just like any other unsecured creditor and as the mortgagor lost the right to possession and to collect the rent, to the extent, indicated above, the State also cannot claim any priority in the sums collected by the Receiver."

There is complete concurrence of judicial opinion holding that the simple mortgagee and the equitable mortgagee have no legal right to take possession of the mortgaged property or to claim any security in the rents and profits accruing from that property. The broad grounds on which such mortgagees were afforded preferential rights in the rents and profits collected by a Receiver appointed at their instance are: firstly, the appointment of a Receiver is an equitable mode of execution permissible under the provisions of the Code of Civil Procedure ; secondly law's delays ought not to prejudice the mortgagee in realising the amount due to him, and thirdly the English law has always recognised and upheld the mortgagee's right to have a Receiver appointed for the liquidation of the mortgage debt.

The right to levy execution by the appointment of a Receiver cannot alter the substantive rights governing the parties to the suit. The rights of the decree-holder are primarily regulated by the terms of the decree and neither the fact that he has obtained a decree nor the fact that he is permitted to have a Receiver appointed as a mode of execution of the decree can clothe him with better rights than what the law otherwise affords him. Delay in the proceedings of Courts is perhaps inevitable and no suitor, however just his claim in the suit may be, can invoke the aid of the Court for reliefs to which he will not be entitled under the substantive law, in anticipation of any prejudice that he may suffer in consequence of a delayed adjudication in his favour. In applying the principles evolved by the English Courts in mortgage actions to mortgage actions in India we should be chary. We shall now briefly refer to the English Law on the subject of mortgages.

The history of the mortgages under the English Law is the history of the interaction of the forces of the Common Law, equity and statute. The ancients knew only of two kinds of mortgages, one by which the lender got possession of the property of the debtor with the stipulation that the rents and profits should go in reduction and in discharge of the principal and interest on the loan, called *vivum vadium* (living pledge) and the other by which the lender took possession of the mortgaged land on the agreement to adjust the rents and profits towards the payment of interest alone called *mortuum vadium* (a dead pledge). By the time of Littleton in the 15th Century the mortgage transaction assumed a different complexion. The mortgagee obtained a conveyance of the fee simple in the lands subject to defeasance by the mortgagor repaying the loan on or before the appointed day fixed by the agreement of the parties. On default of such repayment the mortgagee's ownership of the

fee became indefeasible. But this is is not the only hardship suffered by the mortgagor. Though the land was forfeited to the mortgagee by the non-payment of the debt in due time, the debt remained subsisting and could be recovered from the mortgagor. This rigour of the Common Law which did great hardship and injustice to the borrower came to be mellowed by equity. The object of the mortgage was only to afford security to the lender for the advances made by him, and this true perspective of the transaction came to be recognised by the Equity Courts. Granting relief against forfeiture for breach of a penal condition was one of the essential features of the equity administration. The mortgagor was therefore not expropriated by failure to adhere to the time schedule enjoined by the terms of the contract. Even after the lapse of time prescribed equity allowed the mortgagor to redeem. Tehnically a legal title was in the mortgagee and the mortgagor was only the equitable owner. Besides the legal mortgage which involved transfer of a legal estate equitable mortgages were also possible. A puisne mortgage was an equitable mortgage, as the mortgagor could only deal with his equitable interest as there was no residue of legal interest in his hands after his first mortgage. An agreement to create a legal mortgage in favour of the mortgagee could only operate as an equitable mortgage entitling the lender to enforce specific performance of the promise. The Law of Property Act, 1925, brought in radical changes in the legal conception of mortgages.

The modern law of creating a legal mortgage, is thus set out by Cheshire in his *Real Property*, 8th Edition, page 550 :

"A legal mortgage of an estate in fee simple must be effected by either—(1) a demise for a term of years absolute, subject to a provision (called a provision for cesser) that the term shall cease if repayment is made on a fixed day ; (2) a legal charge by deed."

" To confine our attention for the moment to the former method, the Act does not state for what period the lease must be made, but it enacts that if any person in future attempts to create a mortgage by the old method of a transfer of the fee simple, the conveyance shall operate as a lease of the land for 3,000 years, without impeachment for waste, but subject to cesser on redemption. There is, of course, no obligation for a mortgage term to be granted for so long a period as this.

If it is desired to create further legal mortgages in the same land, the mortgagor may lease the land to each mortgagee after the first for a term which is usually at least one day longer than the term limited to the immediately preceding mortgagee. If, for instance, the mortgagor raises money first from *A*, then from *B* and then from *C* on the security of Blackacre, there may be

a lease to *A* for 3000 years,

a lease to *B* for 3,000 years and one day (subject to A's term) and

a lease to *C* for 3,000 years and two days (subject to the terms of *A* and *B*).

The effect in such a case is that the second and all subsequent mortgagees now take legal interests in the land instead of mere equitable interests as formerly.

This is a radical change in the law."

An equitable mortgage may be made either (1) by an agreement to create a legal mortgage ; (2) by a mortgage of an equitable interest ; (3) by a deposit of title deeds ; or (4) by an equitable charge. (*Halsbury*, Vol. 27, 3rd Edn., page 157).

In *Prudential Assurance Co., Ltd.* v. *J. C. Calstaum*[1], Sen, J., at page 204, made the following observation :

" I realise that the English law regarding mortgages is not always a safe guide for the determination of all questions regarding the respective rights of mortgagors and mortgagees in this country, and that, wherever rights have been regulated by the statute law of this country, there can be no scope for a reference to the English law regarding those rights. I realise also that the relative rights of the mortgagor and mortgagee in England have to a very large extent been influenced and regulated by the principles which flow from the distinction which prevails there between the legal and equitable estate and that in this country, there being no such distinction, the respective rights of the mortgagor and mortgagee would not be affected by those principles."

With respect we agree with this observation of the learned Judge.

In this connection we may usefully refer to the decision of the Judicial Committee in *Ram Kinkar Banerjee* v. *Satya Charan Srimani*[2]. Lord Porter at page 59 observed thus :

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1. I.L.R. (1940) 1 Cal. 197.
2. (1939) 1 M.L.J. 544 : I.L.R. (1939) Mad. 283 : L.R. 66 I.A. 50 at 59 (P.C.).

"Up to the time of the passing of the Transfer of Property Act the rights of mortgagors and mortgagees of land in India were subject to much controversy, though in general the law of England, subject to such modification as justice, equity and good conscience required, was recognised as the law of India also. But whether the English rules of equity were applicable to such cases was not certain. Since the passing of that Act, however, the distinction drawn in England between law and equity in such cases does not exist in India."

Again at page 60:

" . . . . The Indian authorities recognize the principle that the distinction between law and equity has no place in Indian law. The Act (Transfer of Property Act) was a self-contained code by which alone the rights of mortgagor and mortgagee were to be ascertained and under which statutory and not equitable rights were brought into existence."

Again at the same page:

"The outlook is different. By Indian law the interest which remains in the mortgagor is a legal interest and its retention may therefore prevent the whole of the mortgagor's interest from passing to the mortgagee—a result which would not follow if an equitable interest only were retained.

Under the Indian statute law a mortgage is defined as a transfer of an interest in an immovable property and it is never a transfer of ownership in such property. The English mortgage and the equitable mortgage created by deposit of title deeds are only two different kinds of statutory mortgages recognised by section 58 of the Transfer of Property Act, and so far as the rights of parties in such mortgages are concerned they bear no resemblance to their analogous provisions under the English law. The rights under mortgage transactions in India should not be coloured by English doctrines of mortgage law.

What is the legal effect of the appointment of a Receiver by a Court in a pending action? The Receiver in a suit is nothing more than the hand of the Court so to speak, for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court in order to preserve the subject-matter of the suit *pendente lite*; and the possession of the Receiver is simply the possession of the Court, *Wilkinson* v. *Gangadhar*[1]. A Receiver appointed by the Court is in no sense an agent or trustee for the party at whose instance the appointment is made. He is an officer of the Court appointed for the benefit of all the parties to the action and their rights *inter se* are not affected. As between the mortgagee and the mortgagor, therefore, if the Receiver embezzles or otherwise wastes the rents and profits, the loss must fall primarily on the mortgagor (*Halsbury*, Vol. 32, 3rd Edn., page 384.)

In *Orr* v. *Muthia Chetti*[2], Muttuswami Ayyar, J., described the status of the Receiver thus:

"The appointment is the act of the Court and one made in the interests of justice or *ex debito justitiae*. He is an officer or representative of the Court, and subject to its orders. His possession is the possession of the Court by its Receiver, and the tenants in possession, when he is appointed to receive rents and profits of immovable property, become virtually tenants *pro hac vice* of the Court, their landlord. His possession is the possession of all the parties to the proceeding according to their titles. The moneys in his hands are *in custodia legis* for the person who can make a title to them."

It is clear that the appointment of a Receiver in a mortgage action at the instance of the mortgagee with a view to appropriate the rents and profits from the mortgaged property towards his mortgage dues cannot by itself improve his subsisting rights as a mortgagee. If on the date of the suit his relief to obtain personal remedy against the mortgagor was not barred by limitation and was also capable of enforcement, the appointment of a Receiver can at best be in the nature of an attachment before judgment, of the properties of the mortgagor other than the hypotheca. It is settled law at least so far as this Court is concerned (*Krishnaswamy Mudaliar* v. *Official Assignee of Madras*)[3], that an attachment of property does not create a security in favour of the person who obtains the attachment. The legal result of an order appointing a Receiver cannot in any way be different from the result flowing from an order of attachment.

Kaluram v. *Shyam Sunder*[4], dealt with a case of a Receiver appointed in execution of a simple money decree. The properties of a judgment-debtor were placed under

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1. 6 Beng.L.R. 486.
2. (1893) I.L.R. 17 Mad. 501.
3. (1903) I.L.R. 26 Mad. 673 (F.B.).
4. (1948) I.L.R. 27 Pat. 816.

the management of a Receiver appointed in an execution proceeding and the Receiver realised a large amount by granting leases of coal mines in a village which were attached in execution of another decree and the amount was lying with the Receiver. An application for rateable distribution was filed by the persons who had obtained decrees against the judgment-debtor. On an objection being raised that the money could not be rateably distributed, it was held that the Receiver having been appointed in execution, and execution by appointing a Receiver being one of the modes of execution sanctioned by law, the money in the hands of the Receiver should be treated as assets held by a Court within the meaning of section 73 of the Civil Procedure Code and that therefore the decree-holders were entitled to rateable distribution of the money in the hands of the Receiver.

Mr. R. Ramamurthy Iyer, learned counsel for the respondent, contended that the mortgagee acquired a lien on the amounts realised by the Receiver from and out of the rents and profits of the hypotheca, and that such a lien came into existence, by virtue of the order of appointment and the relationship of mortgagor and mortgagee between the parties to the action.

> "Liens arise either by operation of law or by agreement between the parties. Liens arising by operation of law (liens by implication, implied liens) are those which arise from the relation of the parties, without express or tacit stipulation, and by the rules of the common law (as in the case of the vendor's lien for unpaid purchase money. . . . .) or under the provisions of a statute (statutory liens). Liens by agreement between the parties (conventional liens) are those created intentionally in cases where the relation between the parties is not such as to give rise to a lien by operation of law, as where a carrier stipulates for a general lien on goods sent to him for transmission." (Earl Jowitt—The Dictionary of English Law), page 1092).

It must be mentioned that neither the jural relationship of the parties as mortgagor and mortgagee nor the vesting of the mortgaged properties *in custodia legis* can give rise to a lien in favour of the mortgagee over the realisations of the Receiver. In its secondary sense the word 'lien' may be applied to a right subsisting in a person who has no possession of the property concerned but who nevertheless has a right against the owner analogous to a legal lien. Such a right may arise in equity by statute or under an order of the Court. (*Halsbury*, Vol. 24, page 143). The footnote (*r*) in *Halsbury*, Vol. 24, page 143, is as follows :

> "There would seem to be no purpose in so describing a right arising under an order of the Court for such a right would be enforceable in the same way as any other provision of the order and is not subject to special considerations."

An order of Court ear-marking certain funds to the benefit of a party will bind the parties to the order, and it is not necessary to invoke any theory of lien to support the order or to benefit the person in whose favour the order was made.

It is not possible to infer a lien from the fact that the Receiver has to deposit the amount realised by him to the credit of the suit in which he is so appointed. In In re *Potts*; *Ex-parte Taylor*[1], Messrs. Taylor & Sons recovered judgment against Potts in an action in the Queen's Bench Division for £316-15-0 for goods sold and delivered and £7-10-0 for costs. Before the money could be realised by execution Potts' mother died and he thereupon became entitled under her will to a share in her residuary real and personal estate. Taylor & Sons obtained an *ex parte* order appointing one E.C. Moore as Receiver to receive the money receivable in respect of the share to which Potts was entitled in the residuary estate under the will of his mother. It was ordered that the Receiver should pay the balance or balances appearing due on the accounts left or such part thereof as should be certified as proper to be so paid in or towards the satisfaction of what should for the time being be due in respect of the judgment signed on 25th July, 1891 for the sum of £316-10-0 debt and £7-10-0 for costs. On May 16, 1892, a receiving order was made against Potts on his own petition and on May 19 he was adjudicated a bankrupt. The question for consideration was whether the money in the hands of the Receiver can be claimed by the trustee in bankruptcy or can be claimed by the judgment-creditor Messrs. Taylor & Sons. It was contended on behalf of Messrs. Taylor & Sons

1. L.R. (1893) 1 Q.B.D. 648.

that there was an equitable lien in their favour on the fund in Court. This argument was negatived. At page 659 Lord Esher, M.R. observed thus :

"An order appointing a Receiver can only amount to a charge if it charges the person in whose hands the money is, not to deal with it except in one way. In my opinion, therefore, this order was not a 'charge', was not a 'mortgage', and was not a 'lien', either legal or equitable, and consequently Taylor and Sons were not 'secured creditors' within the meaning of sub-section (2) of section 9, and by virtue of sub-section (1) the bankruptcy took away from them the right to receive this money in priority to the other creditors."

Lindley, L.J., made the following observation at page 661 :

"It is simply an uncompleted process to obtain payment of money. It is not a charge, because there is no order upon the executors to pay the money. If they did not choose to pay it to the Receiver they could not be attached for disobeying the order. It is true that by proper proceedings an order for payment could be obtained against them. It would be almost as of course, and, unless they could give some good reason for not paying the Receiver, they would probably have to pay the costs of the application. But still the property was not yet the judgment-creditors'; it was short of that ; they had not acquired an equitable interest in the property as distinguished from a right to get it by a process which was not yet complete."

Bowen, L.J., stated thus at page 662 :

"It seems to me that it does not amount to the creation of an equitable interest in the nature of a charge upon the fund. It falls short of that. It is a mere direction to the Receiver to receive money and to pay it over to the creditors when he does receive it. There is nothing to create an interest in the fund, nor could such an interest, as it seems to me, be created by a Judge at chambers in this way."

In In re *Pearce Ex-parte*: *The Official Receiver, The Trustee*[1], two creditors Pearce and Jones recovered judgment against their debtor for certain sums of money. On December 23, 1915, an order was made in both the actions appointing a Receiver in respect of the debtor's interest in a hotel called the Opera Hotel of which he was the lessee. Under the order, the Receiver was to apply the profits received by him in carrying on the business through the existing manager in making certain specified payments, and 'in making such further payments as may hereafter be directed', and the order provided that the Receiver do retain the balance of the said profits, to be applied in discharge of the debt and costs due to the plaintiffs as and when may be hereafter ordered. On March 12, 1918 a receiving order was made against the debtor who was adjudicated a bankrupt on May 8, 1918. The Official Receiver became the trustee of the property of the debtor. The trustee claimed the money received by the Receiver and his claim was upheld by the Court of Appeal. The Master of the Rolls observed thus at page 363 :

"Counsel for the plaintiffs said that he had to satisfy this Court that the order, if it was to amount to a charge, must come within Lord Esher's expression in In re *Potts*[2]; 'An order appointing a Receiver can only amount to a charge if it charges the person in whose hands the money is, not to deal with it except in one way. That must mean 'except to pay it to, or hold it for, the execution creditor'. In this case it does not come to anything of the sort ; it comes nowhere near it. The effect of the order is simply that the whole fund is to be held at the disposal of the Court ; it is liable to have paid out of it such further payments as may thereafter be directed by the Court before there is any question of any balance being dealt with at all. I think it is quite manifest that the orders do not amount to any positive direction either ordering payment to the execution creditors or ordering the fund to be held for the execution creditors or restricting its being dealt with except by being paid to, or held for, the benefit of the execution creditors."

Eve, J., observed thus at page 365 :

"These orders did not, in my opinion, confer on the judgment-creditors any equitable interest in the moneys as distinguished from a right to get them by a process not yet completed. Until that process is completed by an order for payment the moneys are held by the Receiver in medio between the parties, and as the debtor has become Bankrupt, and the title of his trustee has supervened before there has been any order for payment, the title of the trustee must prevail."

The two English decisions referred to above are clear authority for the position that the judgment-creditor can have no right in the Receiver's collections unless and until there is an order of appropriation towards the mortgage debt by the Court. Till then the fund in Court is in medio. As Varadachariar, J. pointed out in *Jagannatha Rao* v. *The Maharajah of Pittapur*[3], it is not correct to view all money in the hands of the Receiver as necessarily appropriated towards the satisfaction of the

1. L.R. (1919) 1 K.B. 354.
2. L.R. (1893) 1 Q.B.D. 648.
3. (1935) 69 M.L.J. 534.

decree. The Court has got the power to give directions to him in respect of the disbursement of the moneys and in proper circumstances such directions may also be for the benefit of the judgment-debtor. Depositing the money collected by the Receiver to the credit of the suit cannot have the effect of appropriation or allocation of the amount towards the discharge of the decree in the suit.

In *Ramiah Aiyar* v. *Gopala Aiyar*[1], the defendant in a suit was arrested before judgment and was ordered to be released from custody on depositing into Court a sum of money sufficient to meet the plaintiff's claim in the suit, under Order 38, rule 2, Civil Procedure Code. There was subsequently an attachment of the money by a decree-holder and an adjudication of the defendant as an insolvent. It was held that the money was paid into Court to the general credit of the action and charged with a lien in favour of the plaintiff on the latter obtaining a decree in his favour and that the attaching creditor and the Official Receiver's claims were subject to this lien. At page 1056 Coutts Trotter, J., observed as follows :

" . . . . . where money is not deposited in Court in order to secure something being done by the person who deposited it, such as abstaining from going away or removing his property from the jurisdiction of the Court but where money is paid to the credit of the suit or ear-marked for the suit, the Courts have always held that, when that is done, the money belongs to the plaintiff in the event of his success and that it cannot pass to the general creditors of the person who pays it in or to any person who claims under him."

This decision was one based upon the language of Order 38, rule 2, Civil Procedure Code, which is as follows :

" Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to that last preceding rule."

The deposit made in that case was held to fall within the first portion of rule 2 set out above and as the deposit was intended to answer the claim the learned Judge held that the amount so deposited was charged with lien on the plaintiff obtaining a decree in his favour. That decision cannot be treated as an authority that whenever a sum of money is deposited in Court to the credit of a particular suit a charge or lien inheres to the deposit in favour of the party succeeding in the suit.

The true position, in our opinion, is that the order of appointment of a Receiver in an action of a simple mortgagee or an equitable mortgagee to recover the mortgage amount with a direction to him to bring in the rents and profits from the hypotheca to the credit of the suit without an order of appropriation or allocation in favour of the mortgagee does not amount to a charging order in favour of the mortgagee. Independently of the order appointing a Receiver a simple mortgagee or an equitable mortgagee or a charge-holder in respect of an immovable property has no security over the rents and profits accruing from that property. Whatever disabilities the mortgagor may suffer by the Receiver taking possession of the hypotheca as the hand of the Court, no special rights are conferred in favour of the mortgagee by reason only of such appointment.

We are of opinion that the decisions reported in *Maharajah of Pittapuram* v. *Gokuldas Goverdhandoss*[2]; *Arunachalam Chettiar* v. *Ramanathan Chettiar*[3]; *Mohideen* v. *Nagu Bai*[4], were wrongly decided, and that they must be overruled. We agree with the conclusion reached by Wadsworth, J., in *Sambasiva Chettiar* v. *Secretary of State for India in Council*[5] and that of Mack, J., in *Income-tax Officer* v. *Ind. Ins. and Banking Corporation*[6], but not with the reasoning contained in their judgments. We express our concurrence with the decision of the Rangoon High Court in *Soniram Rameshur* v. *Mary Pinto*[7], but our respectful dissent from the decisions in *Ma Joo Tean* v. *The*

1. (1918) 35 M.L.J. 355 : I.L.R. 41 Mad. 1053.
2. (1931) 61 M.L.J. 111 : I.L.R. 54 Mad. 565.
3. (1934) 41 L.W. 495.
4. (1939) 1 M.L.J. 730: I.L.R. (1939) Mad. 496.
5. (1940) 1 M.L.J. 429.
6. (1953) 1 M.L.J. 496.
7. I.L.R. 11 Rang. 467.

Collector of Rangoon[1]; *Aga G. Ally Ramzan Yezdi* v. *Balthazar & Sons, Ltd.*[2], and that of the High Court of Andhra Pradesh in *Adikesava Chetty* v. *The State of Madras*[3].

In the result C.M.A. No. 120 of 1957 is allowed and the Judgment of the Court below in I.A. No. 245 of 1956, Sub-Court, Tiruchy, is set aside and there will be an order in favour of the Collector as prayed for by him in that application. As the order of the Court below has been set aside in the C.M.A. C.R.P. No. 512 of 1957 is unnecessary and it is hereby directed to be dismissed.

C.M.A. No. 103 of 1957 and C.R.P. No. 443 of 1957 are dismissed and the order of the Court below in E.A. No. 350 of 1955 and 423 of 1956 are hereby confirmed.

There will be no order as to costs in all the C.M.As. and the C.R.Ps.

R.M. ——— *C.M.A. No.* 120 *of* 1957 *allowed; C.M.A. No.* 103 *of* 1957 *and C.R.P. Nos.* 512 *and* 443 *of* 1957 *dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMACHANDRA IYER, MR. JUSTICE JAGADISAN AND MR. JUSTICE SRINIVASAN.

S. R. Rajender and others .. *Appellants**

v.

N. S. Govindier and others .. *Respondents.*

Madras City Tenants' Protection Act (III of 1922) *(as amended by Madras Act XIX of* 1955), *section* 8 *—Construction—Order fixing rent under section* 7-*A—Appealability.*

An appeal lies from an order fixing reasonable rent under section 7-A of the Madras City Tenants' Protection Act, 1922, as amended by Madras Act (XIX of 1955).

The criterion for determining the maintainability of an appeal is the character of the decision under appeal and not whether the proceedings in which the decision was given originated on a plaint or an application. The Court would be governed by the ordinary rules of procedure and an appeal would lie from orders, if authorised by the existing rules.

Perumal v. *Kondal*, (1939) 1 M.L.J. 80 : I.L.R. (1939) Mad. 213, overruled.

National Telephone Company, Ltd. v. *Postmaster-General*, L.R. (1913) A.C. 546; *Adaikappa Chettiar* v. *Chandrasekharathevar*, (1948) 1 M.L.J. 41 : L.R. 74 I.A. 264 : I.L.R. (1948) Mad. 505 (P.C.) and *Arunachala Naicker* v. *Ghulam Mohmood Sahib*, (1959) 1 M.L.J. 181, followed.

Hem Singh v. *Mahant Basant Das*, (1936) L.R. 63 I.A 180 : I.L.R. 17 Lah. 146 (P.C.), relied on.

As the order is appealable no revision lies against such an order.

A.A.A.O. No. 51 *of* 1961 :

Appeal against the Order of the District Court of Madurai dated 10th February, 1958, in A.S. No. 32 of 1958, preferred against the Order of the Court of the District Munsif, Madurai Town, dated 17th December, 1957, in O.P. No. 24 of 1957.

C.R.P. No. 515 *of* 1958:

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order, dated 17th December, 1957, in the said O.P. No. 24 of 1957.

T. R. Ramachandran, for Appellants.

R. Viswanathan for *S. Gopalaratnam*, for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This Civil Revision Petition has been posted before us under the directions of the Hon'ble Chief Justice, as the determination of the

1. I.L.R. 12 Rang. 437.
2. I.L.R. 14 Rang. 292.
3. I.L.R. (1937) A.P. 505.

* A.A.A.O. No. 51 of 1961 and C.R.P. No. 515 of 1958. 30th March, 1961. (9th Chaitra, 1883, Saka).

question arising therein, namely, whether an appeal lies from an order passed by a civil Court fixing a reasonable rent under the provisions of section 7-A of the Madras City Tenants' Protection Act, involves a consideration as to the correctness of the decision reported in *Perumal* v. *Kondal*[1].

The respondents, the owners of a piece of vacant land measuring 250 feet by 105 feet in Madurai Town, granted a lease of it in the year 1942 to the petitioners at an yearly rent of Rs. 100. By a subsequent agreement between the parties the rent was increased to Rs. 900 per annum. The Madras City Tenants' Protection Act, 1922 (as amended by Act XIX of 1955), to be referred to as the Act, which conferred certain rights on the tenants of land let out for construction of buildings thereon, was extended to Madurai Town on and from 29th June, 1955. Taking advantage of the provisions therein and alleging that the subsequently agreed rent could not be treated as a fair rent as the agreement relating to it was not a voluntary one, the tenants applied to the District Munsif of Madurai Town for fixation of a reasonable rent for the land taken on lease by them. The learned District Munsif, after considering the relevant evidence in the case, fixed rent at the rate subsequently agreed to between the parties namely, at Rs. 75 per month. Aggrieved by the decision, the tenants filed an appeal in the District Court. The learned District Judge, however, dismissed the appeal *in limine* on the ground that it was incompetent. In so doing, he followed the decision of this Court in *Perumal* v. *Kondal*[1].

In that case Burn and Stodart, JJ., held that having regard to the terms of sections 7 and 8 of the Act, no appeal would lie from an order made by a Court under the former provision such order not being a " decree in a suit ". The correctness of that view, which has been challenged in this Civil Revision Petition has to be decided on a contruction of the provisions of the Act.

The Madras City Tenants' Protection Act, 1922, was enacted to give protection to tenants of land who had constructed buildings on the lands in the hope that they would not be evicted so long as they paid the fair rent for the land. As originally enacted, it applied only to the tenancies in the Madras City created before its commencement. The Act was amended by Madras Act XIX of 1955, which extended the benefits of the Act to tenancies created prior to the coming into force of the amending Act, namely, 10th September, 1955. Act XIX of 1955 empowered the Government by means of a notification to extend the provisions of the Act to such Municipal Towns as they may consider necessary. The Act creates a right in the tenant to obtain compensation for the buildings put up by him on the demised property on eviction. It also confers on him an option to purchase the land subject to certain conditions prescribed in section 9. It entitles the tenant to a proper notice before eviction. Sections 6, 7 and 7-A of the Act invest a jurisdiction in the Court to determine the fair rent payable for the land during the period of tenancy in the cases specified in the respective sections. Section 6 relates to the case of fixation of fair rent where in a suit for eviction after an order for payment of compensation to the tenant, the landlord is unable or unwilling to pay the same. Sections 7 and 7-A respectively provide for a case where no suit for eviction is pending. The landlord or the tenant can apply to the Court having jurisdiction to fix such rent as it deems reasonable. Section 7-A which is relevant for the present purpose runs thus :

> " Where, on an application under section 7 the rent previously payable for a land has been enhanced, the tenant may apply to the Court having jurisdiction to entertain a suit for ejectment or to the Presidency Small Cause Court for a reduction of the rent fixed and thereupon the Court shall by its order fix such rent as it deems reasonable :
>
> Provided that the rent previously payable for the land shall not be reduced by more than 2 annas in the rupee. "

Section 8 runs :

> " An order passed by a Court under section 6, 7 or 7-A, shall have effect as a decree in a suit and the rent so fixed shall not be revised nor shall the tenant be liable to be evicted, for a period of five years. "

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1. (1939) 1 M.L.J. 80 : I.L.R. (1939) Mad. 213.

Sections 6, 7, and 7-A create a new right and provide also a remedy for enforcing the same. Under the ordinary law, the rent payable in respect of property taken on lease would be govered by the contract between the parties. It would not be competent for a Court to fix the rent for the obvious reason that apart from agreement there would be no right to pay any particular sum as rent. The Act creates a certain right in the tenant unknown to the ordinary law : it obliges the landlord, if he wants to evict the tenant from his land, to either compensate for the buildings put up on the land or at the option of the tenant (exercised in the manner specified in section 9) part with the land for a price to be fixed by Court. The result of the provisions is that a landlord cannot evict the tenant on the termination of the lease unless he is agreeable to take the risk of being bought out or in other cases has the capacity and willingness to pay compensation for the superstructure. If he does not want to evict the tenant, justice requires that the original rent agreed upon should be revised commensurate with the appreciation or otherwise of the value of the property. Parties might not however agree for such revision. The statute has therefore empowered the Court to fix a reasonable rent for the land on the application of either the landlord or tenant. A right to have a rent fixed superseding the contractual rent is thus a new right unknown to the ordinary law which owes its existence to the statute.

Where a statute creats a new right or liability, not existing at Common law, and also provides for a particular remedy for enforcing that right, the rule is the remedy so provided would be the exclusive or only remedy. Where therefore in such a case the statute itself prescribes the procedure, it is that procedure that has to be adopted by a party for enforcing the right. But there are cases where the enforcement of the right created by a statute is given to an established Court of the land without anything more. Sections 6, 7 and 7-A of the Act belong to the latter class : they confer a power in the appropriate Court having jurisdiction to entertain a suit for eviction, to fix the reasonable rent for the property. The Act does not provide for any special procedure to be adopted by the Court while fixing the reasonable rent for the land. Nor does it provide expressly for an appeal from an order fixing the rent. The question would then arise whether in respect of those orders there would be a right of appeal to a superior Court.

Before considering that aspect of the matter it will be useful or even necessary to refer to certain well-known principles. A right of appeal against an order of a judicial Tribunal is not inherent right of a party. It requires legislative authority. Such authority should be given expressly and cannot be implied ; nor can it be inferred to exist by way of analogy. A statute can grant an express right of appeal in one of two ways : (*i*) by an express provision in the statute itself or (*ii*) by conferring the jurisdiction to adjudicate rights created by it to an existing Court or tribunal simpliciter, whose orders are subject to appeal under the law regulating its procedure. In such a case the express authority for appeal is found not in the statute creating the right but in that which regulates the procedure of the existing tribunal which procedure is attracted in the adjudication of the new right. This rule is stated in *National Telephone Company, Ltd.* v. *Postmaster-General*[1], where Viscount Haldane, L.C., observed at page 552 :

> "When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches. "

To the same effect are the observations of Lord Parker of Waddington at page 562, who stated :

> "Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same. "

On the principle recognised in the decision referred to above, the Court in adjudging the dispute under the Madras City Tenants' Protection Act, would be

1. L.R. (1913) A.C. 546.

bound to follow its own authorised procedure, namely, the Code of Civil Procedure. The Code contains provisions for appeals against decrees and orders. If an adjudication of a claim under the Act amounts to a decree or an appealable order, that too would be appealable by virtue of the express provision in the Code of Civil Procedure which governs such adjudication.

Taking the case of a reasonable rent fixed under section 6, 7 or 7-A of the Act, an order of a Court fixing such rent would be appealable if the provisions in the Code regarding appeals, namely, sections 96, 104, etc., would apply to it. The appeal in such a case is by reason of the express authority contained in the statute and not because of any implication of law. In other words, the jurisdiction conferred under the Act on the civil Court is regarded as an extention or addition to its existing jurisdiction and the rules of procedure, including the right of appeal, which apply to matters covered by the existing jurisdiction of the civil Court, would equally apply to the extended jurisdiction : vide *Hem Singh* v. *Mahant Basant Das*[1].

It has then to be considered whether the orders passed in respect of claims made under the Act could be held to come within the scope of section 96 or 104 of the Code of Civil Procedure. Such orders can be broadly divided into two categories: (1) those made in the course of a suit for eviction ; (2) those made on an original application. For example, orders made under sections 4 and 9 belong to the former category. Such orders governing as they do the decree in the suit or orders in execution thereof would in essence partake of the character of the adjudication which they govern. Orders in an application under section 6 which is unrelated to the decree or those under section 7 or 7-A or one made on a tenant's original application to buy the land within the time permitted by section 9 would stand on a different footing.

Before adverting to the question whether the latter category of orders are appealable, we shall refer to two cases, coming under the former category to elucidate the principle. In *Adaikappa Chettiar* v. *Chandrasekhara Thevar*[2], an application was filed for amendment of the decree under section 19 of the Madras Agriculturists Relief Act. That application was dismissed on the ground that the judgment-debtor was not an agriculturist entitled to the benefits of the scaling down provisions of the Act. The Privy Council held that the order rejecting the application would be appealable as a decree, notwithstanding the fact that the Madras Agriculturists Relief Act did not in terms provide for an appeal against an order amending or refusing to amend the decree. Lord Simonds in the course of his judgment observed:

> "The true rule is that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute, the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer any right of appeal."

Recently, one of us had to consider in *Arunachala Naicker* v. *Ghulam Mahmood Sahib*[3], the question whether an order passed rejecting the application of a tenant in a suit for eviction claiming benefits under section 9 of the Act is appealable. It was held that an appeal would lie in cases where the adjudication amounted to a decree and also in cases where it had the effect of deciding a question in execution within the scope of section 47 of the Code of Civil Procedure.

Coming to the case now before us, namely, an order fixing reasonable rent for land, it cannot be said that it is either an order in execution of a decree or one coming within section 104, Civil Procedure Code. What remains to be consider is whether it can be said to amount to a decree so as to attract section 96, Civil Procedure Code. In *Arunachala Naicker* v. *Ghulam Mahmood Sahib*[3], there is an observation that orders under sections 6, 7 and 7-A of the Act would be appealable as decrees. The question however did not directly arise in that case. A decree as defined in section 2 (2) of the Code of Civil Procedure means a formal expression of an adjudication which conclu-

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1. (1936) L.R. 63 I.A. 180 : I.L.R. 17 Lah. 246 (P.C.).
2. (1948) 1 M.L.J. 41 : L.R. 74 I.A. 264 : I.L.R. (1948) Mad. 505 (P.C.).
3. (1959) 1 M.L.J. 181.

sively determines the rights of parties in regard to a matter in controversy in a suit. When a new right is created by a statute and the ordinary Court determines the right, the determination would undoubtedly resemble the adjudication of civil rights, the jurisdiction in respect of which is conferred by section 9 of the Code of Civil Procedure. What has to be considered then is whether the rules of procedure particularly those relating to appeal which govern the adjudication of existing civil rights would apply to those which resemble it. The observation of Lord Atkinson in the case to which we have made reference earlier, namely, *National Telephone Company, Ltd.* v. *Postmaster-General*[1], is useful in this connection. That noble Lord stated :

> "My Lords, if the matter stood there I think it would be clear that this section only added another item to the several matters which the Commissioners have already power as a Court of law to determine just as they determine as a Court of law matters arising under section 9 of the Act of 1873. It is not, in substance, in my view, at all a question of giving a right of appeal by implication. It is simply the question of extending the jurisdiction of an existing Court of law, with all its incidents including a right of appeal to a new matter closely resembling in character those matters over which it has already jurisdiction as a Court of law."

A reasonable rent fixed under the provisions of sections 6, 7 and 7-A would closely resemble a decree made by the Court. For, the order under those sections is the result of an adjudication made by a Court in respect of right created by the statute. Section 8 no doubt says that the rent so fixed can be revised after five years ; but that provision does not affect the character of the adjudication ; it is only an enabling provision rendered necessary by the nature of the subject-matter. The provisions of the section do not militate against the order being conclusive so far as the Court is concerned till it is revised in the manner allowed. Section 8 itself would appear to show that the Legislature intended that the determination of a reasonable rent should operate as a decree. But it is contended and the contention is supported by the observations of the learned Judges in *Perumal* v. *Kondal*[2], that what section 8 creates is a fiction and as a fiction is opposed to reality, the order cannot amount to a decree for the purposes of appeal. That, however, is not a correct way of approaching the question. Where a fiction is created by a statute for a particular purpose, that fiction is deemed to be the reality for that purpose. No doubt a fiction cannot be extended beyond the purpose for which it is created. What is necessary to consider therefore is the precise field of operation of the fiction. If for example the fiction is created for the purpose of giving all these rights which a party has in respect of a decree passed against him, it would be effective to enable the party to file an appeal as well. Learned counsel for the respondent contended that an order under section 7-A is to be a decree only for the limited purpose mentioned in the section, namely, that the rent fixed shall be final and shall not be revised for a period of five years, and the fiction cannot be extended for any other purpose than that specified in the section itself. The construction contended for cannot be accepted. Section 8 consists of two parts : (i) that the order fixing the rent shall have effect as a decree. This creates the fiction ; (ii) that the rent fixed shall not be revised nor shall the tenant be liable to be evicted for a period of five years. The latter part of the section does not limit or govern the former part. The two clauses are as it were disjunctive. Suppose, no application for revision of a reasonable rent is at all filed after a period of five years. The original order fixing the reasonable rent would undoubtedly continue to have effect as a decree. Again the purpose of the latter clause is clear. For, if it were not there, any adjudication of reasonable rent would be binding for all time between the parties and if such a rule were to exist, the rent to be paid might become unrelated to the vlaue of the property. A provision therefore had to be inserted to enable a revision. Further, if the argument of learned counsel were to be accepted, there would be no necessity for the fiction at all, for if the object of the Legislature were merely to make the rent fixed unalterable for a period of five years, the second clause in the section alone would have sufficed. It is a settled rule of construction of statutes, that one should not ascribe, without necessity or sound reason, to the language of the statute, tautology or superfluity, but should on the contrary assume that every word was intended to

1. L.R. (1913) A.C. 546 at 555.
2. (1939) 1 M.L.J. 80 : I.L.R. (1939) Mad. 213.

have some effect or to have some use. It must therefore be presumed that the words " shall have effect as a decree in a suit " were intended to have some meaning ; they are not merely otiose or unnecessary. The intention of the Legislature must presumably be something other than that expressed in the latter part of section 8. In the context it can only be to attract all the consequences which attach to a decree in a suit, namely, finality, executablity, appealability, etc.

In *Achinta Nath Sasmal* v. *Gobinda Prasad Das*[1], a question arose whether an appeal lay from an order restoring possession of mortgaged property under section 26-G, sub-section (5), of the Bengal Tenancy Act. The learned Judges held that the words " shall have the effect of a decree " cannot by implication authorise an appeal. But the decision in that case was rendered in the context of the provisions contained in the Bengal Tenancy Act, which expressly provided for a right of appeal whenever the Legislature thought fit to confer. For example, in section 158 (3) of the Act it stated :

> " The order on any application under this section shall have the effect of, and be subject to the like appeal as, a decree. "

The fact that the Legislature itself thought it necessary to add the latter part of the section, unmistakably showed that the former part, namely, " shall have the effect" was not intended to confer right of appeal. But so far as the Madras City Tenants Protection Act is concerned, there is no such indication. On the other hand if the incidents of a decree in a suit are not to be attracted to the order contemplated by the section, the first part of it would be meaningless. Secondly, the nature of the order, *i.e.*, imposing a recurring liability or reducing such liability, does demand that there should be an appeal. In *Perumal* v. *Kondal*[2], the learned Judges held that the words " shall have effect as a decree in a suit " themselves showed that the order under section 7 was not a decree. True. It is because that the order does not amount to a decree that the statute enacted section 8 to create a fiction that it is a decree. If the field of operation of that fiction is held to extend to filing of appeals as if the order amounted to a decree, an appeal cannot be negatived by saying that actually it is not a decree : to do so would be to ignore the express provision of the statute.

Learned counsel for the respondents then contended that according to the definition contained in the Civil Procedure Code, the adjudication of rights of parties would amount to a decree only if it were made in a suit ; and as the initiation of proceedings under sections 6, 7 and 7-A have to be made only by means of an application, any order passed thereon would not amount to a decree. Reliance was placed in this connection on certain observations of Madhavan Nair, J. (as he then was) in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*[3], wherein it was stated that there could be no decree except in a suit initiated by a plaint. The view taken by the learned Judge has not been accepted in a later decision of this Court, a reference to which will be made presently. But that consideration apart, the learned Judge's observations cannot apply to a case like the present where the statute itself states that the order should be deemed to be a decree in a suit. The point to be decided in that case was whether an appeal lay to the High Court against an order passed by the District Judge in an application under section 84 (2) of the Madras Hindu Religious Endowments Act, 1927. There was no provision in that enactment which stated that the order on the application would amount to a decree. The learned Judge in the course of his judgment made the following significant observation (at page 280) :

> " The term ' suit ' in the Civil Procedure Code can mean only a proceeding instituted by the presentation of a plaint. Of course a proceeding commenced by an application would also fall with in the term ' suit ' if such a proceeding has been specially declared to be a ' suit ' under the Code by the specific provision of any special enactment, for instance, a contentious probate proceedings. "

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1. I.L.R. (1939) 2 Cal. 366.
2. (1939) 1 M.L.J. 80 : I.L.R. (1939) Mad. 213.
3. (1933) 66 M.L.J. 43 : I.L.R. (1933) 57 Mad. 271 (F.B.).

And again at page 281 :

> " The above conclusion is not in any way affected by the decisions relied on by the appellant's learned counsel to show that a proceeding in which the rights of parties are determined may be termed a suit and that an order in such proceeding even though it is commenced by an application should be treated as a decree within the meaning of section 2 (2), Civil Procedure Code. "

The decision in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*,[1] cannot therefore be read as laying down an absolute proposition of law that in no case can an order in an application operate as a decree. Where, as in the present case, there is provision in the statute which treats the order on an application as a decree in a suit, it is not necessary that such order should be made only in a suit, properly so called. As we indicated earlier, the view taken by the learned Judges in that case has not been subsequently accepted as correct ; it is contrary to three decisions of the Privy Council, one of which was rendered subsequent to that decision. Reference to those decisions has been made in *Chikkanna* v. *Perumal*[2]. In that case the question arose as to the appealability of a decision of the Subordinate Judge under section 30 of the Land Acquisition Act. The Full Bench held that the observations contained in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*[1], were no longer authoritative in view of the judgment of the Privy Council in *Bhagwati* v. *Ram Kali*[3].

There have been a number of cases where orders in proceedings initiated by means of applications under special enactments have been treated as decrees and appeals entertained. In *Kamaraju* v. *The Secretary of State for India*[4] a question arose as to whether an appeal lay to the High Court against the decision of the District Court passed under section 10 of the Madras Forest Act, on appeal from the decision of the Forest Settlement Officer. The Full Bench answered the question in the affirmative. The view was accepted in the case of *Secretary of State for India* v. *Chelikani Rama Rao*[5].

In the context of the Civil Procedure Code, *e.g.*, in regard to those matters coming to a Court under section 9, there would be a distinction between an order in an application and a decree in a suit as the Code itself defines them. But in cases where rights are created under other Acts and the jurisdictions thereunder are given to the ordinary Court, the definition cannot obviously apply strictly. Whether a proceeding under that Act would be a suit or not would have to be seen from the nature of the proceeding and not by the mere fact that it is initiated by a plaint or not. *Mahalinga Kudumban* v. *Theetharappa Mudaliar*[6], recognised the principle that in order that an adjudication of a Court might amount to a decree, it was not always necessary that it should originate in a plaint in a suit. The learned Judges observed that the word 'suit' not being defined in the Code, could be applied to any contentious proceeding in a Civil Court in which rights of parties were in question and in which the Court was asked to determine them. Thus, there can be a decree notwithstanding the fact that the proceedings originate in an application.

Mr. Viswanathan, however, contended, that the view taken in *Chikkanna* v. *Perumal*[2], should not be accepted having regard to the decision of the later Full Bench decision in *Sayyed Usman Saheb* v. *Sivaramaraju*[7]. In that case the point that arose for decision was whether an order for restitution passed under section 151, Code of Civil Procedure, was appealable. It was held that as the order was not a 'decree' coming within the definition of section 2 (2), Civil Procedure Code, no appeal would lie from it. Satyanarayana Rao, J., observed that a suit could be initiated only by a plaint and not by an application and that an order on an application not being an order in a suit, would not amount to a decree. The learned Judge did not however consider the decision in *Chikkanna* v. *Perumal*[2]. That was perhaps unnecessary for the

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1. (1933) 66 M.L.J. 43 : I.L.R. 57 Mad. 271 (F.B.)
2. (1940) 1 M.L.J. 732 : I.L.R. (1940) Mad. 791 (F.B.).
3. I.L.R. (1939) All. 460.
4. (1888) I.L.R. 11 Mad. 309 (F.B.)
5. (1916) 31 M.L.J. 324 : L.R. 43 I.A. 192 : I.L.R. 39 Mad. 617 (P.C.)
6. (1928) 56 M.L.J. 387.
7. (1950) 1 M.L.J. 363. (F.B.)

purpose of that case, as the Court there was concerned with a proceeding under the Civil Procedure Code itself; no question arose in that case in regard to a matter in respect of which a new jurisdiction was given to the civil Court by virtue of a statute. There can be no doubt that the character or nature of an order passed on an application under the Civil Procedure Code will have to be determined by the provisions of the Code itself. That the principle of the decision in *Sayyed Usman Saheb* v. *Sivaramaraju*[1] cannot be applied to jurisdictions conferred on a civil Court under a special Act, is clear from a later decision in *Easwara* v. *Sankunni*[2], by Viswanatha Sastri, J., who was a party to the former decision. The matter which came up for consideration was whether an appeal lay in respect of an order in an interlocutory application appointing a Receiver under section 13 of the Malabar Tenancy Act. It was contended that no appeal lay against the order appointing Receiver as the statute did not specifically provide for an appeal against such orders. Section 50 (1) of that statute enacted that the procedure provided by the Code of Civil Procedure, including Order 40 of the First Schedule, would apply to all proceedings relating to applications. Section 50 (2) provided for appeals against certain orders. Section 13 was not specifically mentioned therein. The learned Judge held that as section 50 (1) expressly made Order 40, Civil Procedure Code, applicable to proceedings under the Act, the provisions of Order 43, rule 1 (*s*) would also be attracted and an appeal would lie, as the incorporation of Order 40 in the Malabar Tenancy Act as part of the procedure applicable to proceedings under it, carried with it the right of appeal given by the Code. In *Satish Chandra Nag* v. *Rivasat Hossain*[3], it was held that the criterion for determining the maintainability of an appeal would be the character of the decision under appeal and not whether the proceedings in which the decision was given originated on a plaint or on an application. That was a case where a special jurisdiction was conferred on an ordinary Court of the country in regard to a right created by a statute. It was held that the Court would be governed by the ordinary rules of procedure and an appeal would lie from orders if authorised by the existing rules.

With great respect to the learned Judges who decided *Perumal* v. *Kondal*[4], we are unable to hold that merely because an order under section 7 or 7-A of the Act does not actually amount to a decree, an appeal would not lie from it. Another reason which commended itself to the learned Judges was that the scheme of the Act was not consistent with there being a right of appeal, as the Court was to fix rent as it considered reasonable. We are unable to share that view either; the mere fact that the Act does not expressly provide for an appeal, cannot mean that there would be no appeal from orders as an incident of the extended jurisdiction conferred on the Court by the Act. Nor does the fact that the Court has to fix what it considers as a reasonable rent militate against the adjudication being subject to an appeal. In our opinion, an appeal would lie from orders passed under sections 7 and 7-A of the Act, because the new matter entrusted for adjudication to the Court is one closely resembling the character of matters over which the Court had already jurisdiction and the adjudication in respect of it amounted to a determination of legal rights of parties, thus becoming a decree. This is recognised in section 8 of the Act. The decision in *Perumal* v. *Kondal*[4], cannot therefore be accepted as correct. The Act has further been amended by Madras Act XIII of 1960 which expressly confers a right of appeal to an aggrieved party against an order fixing a reasonable rent. As the question involved in this case arose before the coming into force of that amendment we have not referred to the new section 9-A introduced by the amending Act.

It follows that the order refusing to entertain the appeal by the learned District Judge cannot be sustained. The Civil Revision Petition is allowed and the appeal is remanded for disposal on its merits by the lower Appellate Court. There will be no order as to costs.

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1. (1950) 1 M.L.J. 363.
2. (1951) 1 M.L.J. 15 : I.L.R. (1951) Mad. 859.
3. I.L.R. (1949) 1 Cal. 487.
4. (1939) 1 M.L.J. 80 : I.L.R. (1939) Mad. 213.

C. R, P. No. 515 *of* 1958 :

Ramachandra Iyer. J.—As we have held in A.A.A.O. No. 51 of 1961 (C.R.P. No. 367 of 1958) that an appeal lies against an order fixing reasonable rent under section 7-A of the Madras City Tenants' Protection Act no revision can be entertained. The Revision Petition is dismissed. No costs.

P.R.N. —— *C.M.S.A. allowed.*
C.R.P. dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHAMED KUTTI.

Minor Rajadurai by their mother and guardian Saradambal and another .. *Petitioners**

v.

Kunjurasu Vanniar .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955), *section* 4-*A* (4) *and* (5)—*Joint family owning land in excess of* $13\frac{1}{3}$ *acres—Right of a member for restoration of possession.*

When a Hindu joint family represented by its manager was the landlord under whom a tenant holds lands no member of the family could be said to have any specific share in such land, and if the family as such owns land in excess of $13\frac{1}{3}$ acres on the relevant date, no member of the family could recover possession of land under sub-section (1) of Section 4-A of the Madras Cultivating Tenants' Protections Act, 1955, in view of the express provisions of sub-sections (4) and (5) of that section.

Petition under section 6-B of Act XXV of 1955 as amended by Act XIV of 1956 read with section 115 of Act V of 1908 praying the High Court to revise the order of the Revenue Court, Thanjavur, dated 31st March, 1960 and made in P.No. 124 of 1960.

K. S. Naidu and *R. Vijayan*, for Petitioners.

R. Sundaralingam, for Respondent.

The Court delivered the following

JUDGMENT.—The petitioners seek to revise the order of the Revenue Court, Thanjavur, dismissing their application under section 4-A (2) of Act XXV of 1955 as amended by Act XIV of 1956 for resumption from the respondent-tenant of half the extent of land in his possession for their personal cultivation.

The petitioners with their father and two brothers formed a joint family and the respondent was let into possession of the lands in question while they were joint. In 1959 the petitioners and the other members of the family entered into a partition and in that partition the first petitioner was allotted 6 acres, 66 1/4 cents and the second petitioner 6 acres, $67\frac{3}{4}$ cents of land, including the land in the possession of the respondent. The total extent of the land owned by the family was 47 acres. The petitioners averred that since all the lands allotted to them were in the possession of tenants they are entitled under section 4-A to resume half the extent of land in the possession of the respondent. The respondent resisted the claim contending that the partition was not *bona fide*, that it was intended to circumvent the Act to be promulgated for fixing the ceiling on land, that the properties belonging to the family exceeded $13\frac{1}{3}$ acres, and as such the petitioners are not entitled to resume the lands in his possession.

The Revenue Court dismissed the application on the main ground that the partition deed had not been acted upon and that it was created "only to avert the ceiling Act to be promulgated soon". The learned counsel for the respondent is not prepared to support the ground on which the application was dismissed. Nevertheless, he contended that the petitioners are not entitled to resume any extent of land by reason of sub-sections (4) and (5) of section 4-A.

Sub-section (1) of section 4-A enables a landlord to resume possession from any cultivating tenant for purpose of personal cultivation, lands not exceeding one half of the extent of lands leased out to the cultivating tenant. Sub-section (4) provides that

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* C.R.P. No. 1412 of 1960. 22nd March, 1961.
(1st Chaitra, 1883, Saka).

"Nothing in sub-section (1) shall be deemed to entitle any landlord to resume possession, if on the day the Madras Cultivating Tenants, Protection (Amendment) Act, 1956, comes into force, he owns land exceeding 13⅓ acres of wet land. . . . . nor shall sub-section (1) be deemed to confer on the landlord a right to resume possession of a greater extent than that which along with the extent he is already in possession of either as owner or as tenant or as both would make up an extent of five acres of wet land."

Sub-section (5) is to the effect that

"No person who is not entitled to resume possession under this section on the day the Madras Cultivating Tenants' Protection (Amendment) Act, 1956, comes in toforce shall be deemed to be so entitled by reason of any subsequent change in his circumstances."

The contention of the respondent is that the petitioners' family was the landlord, that it owned more than 13⅓ acres of land on the day on which the Madras Cultivating Tenants' Protection (Amendment) Act, 1956, came into force that if the family was not entitled for this reason to apply for resumption the petitioners are also equally not entitled to do so by bringing about a subsequent change in the circumstance by entering into a partition resulting in the extent of the lands they could claim being reduced to less than 13⅓ acres.

It is not disputed that the crucial date to be taken into consideration in determining whether the landlord was possessed of 13⅓ acres of land is the date on which the Madras Cultivating Tenants' Protection (Amendment) Act, 1956, came into force. It is also not disputed that on the said date the family consisting of five members owned about 47 acres of land. But Sri K.S. Naidu for the petitioners urged that even on the date of the commencement of the Act, the proportionate share of each of the petitioners was less than 13⅓ acres of land and therefore their claim does not come within the mischief of sub-section (5) as in fact, there was no change in the circumstances, the effect of partition being only to sever their joint possession and convert the same into separate possession. The lands in question were leased to the respondent by the family represented by its manager. Until partition was effected no member of the family, though he could in a way claim to be a landlord, predicate to himself any specific share of the lands. Consequently, it is not possible to uphold the petitioner's contention that on the material date, they were landlords in respect of a definite share, proportionate to the number of coparceners then existing. The petitioners, if they were landlords, were landlords of all the family lands. They became landlords of a definite share only subsequent to, and as a result of the partition, in other words by bringing about a change or a severance as regards their joint status in respect of their family lands. This, in my view, amounts to a subsequent change in their circumstances. I am therefore of opinion that sub-section (5) applies to the case and the petitioners are not entitled to resume possession under sub-section (1) of section 4-A. In this view, the order of dismissal has to be sustained. This petition therefore fails and the same is dismissed with costs.

R.M. *Petition dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE VENKATADRI.

Konthalavalli Achi .. *Appellant**

v.

T. S. Ayyadurai Odayar and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938) (*as amended by Act XXIV of* 1950), *section* 9-*A* (10) (*ii*) (*a*) *and* (*b*)—*Applicability and scope of—Section* 9-*A—If confined to usufructuary mortgages as defined by section* 58 (*d*) *of the Transfer of Property Act—Sale of equity of redemption in Court auction—If covered by sub-section* 10 (*ii*) (*a*)—*Sub-mortgage effected by mortgagee—If governed by sub-section* 10 (*ii*) (*b*).

Interpretation of Statutes—Statement of Objects and Reasons—Use of—Marginal Note—If aid to construction—Meaning of words—Principles to be observed.

Section 9-A of the Madras Agriculturists Relief Act (1938), as amended by Act XXIV of 1950, is not restricted in its application to usufructuary mortgages as defined in section 58 (*d*) of the Transfer

*L.P.A. No. 88 of 1956. 28th July, 1961.
(6th Sravana, 1883, Saka).

of Property Act, but applies to all mortgages by virtue of which the mortgagee is entitled to remain in possession of the property mortgaged.

Tirumalpad v. *Krishnan*, (1956) 2 M.L.J. 46, overruled.

Section 9-A (10) (ii) (*a*) of the Act would apply to all sales of equity of redemption, whether by act of parties or by operation of law, that take place during the specified period and not merely to sales effected by act of parties. Sub-section (10) (ii) provides an exemption from the operation of the statutory discharge enacted earlier and on principle there can be no distinction between a case of private sale and a compulsory sale of the equity of redemption, for in either case the scaling down provision would only benefit the purchaser. There is greater reason for not giving the benefit of the scaling down provision to a Court-auction-purchaser than to a private purchaser. The sub-section was enacted to cure a mischief which an unrestricted application of section 9-A might entail. The reason behind sub-section 10 (ii) (*a*) and the construction thereof, after giving effect to the words "devolution by transfer from the mortgagor", alike point to the conclusion that the legislature did not intend to make any distinction between a purchaser from the mortgagor and one who obtained the equity of redemption in a Court sale.

Benjamin v. *Devadoss*, (1954) 1 M.L.J. 537, overruled.

Section 9-A (10) (ii) (*b*) would apply only to cases where there has been an absolute transfer of the mortgagee's right either in whole or part and cannot be availed of to cover cases of all alienations of the mortgagee's right, be it a sale or merely a mortgage. Sub-section 10 (ii) (*b*) would not be attracted where the mortgagee merely creates a sub-mortgage.

Rajagopala Naidu v. *Kunjammal*, (1956) 1 M.L.J. 589; *Narayana Dikshithar* v. *Sundaresa Sastrigal*, (1958) 2 M.L.J. 587 and *Velu Mudaliar* v. *Rajaram Karayalar*, (1955) 69 L.W. 248, approved.

Where the terms of a statutory provision are clear, there is no scope for referring to the Statement of Objects and Reasons as an aid to interpretation.

The marginal note to a section is not part of the section and can afford no aid to the construction of it, particularly when there is no ambiquity.

Where the words of a section are precise and unambiguous, there is no justification for seeking any aid for its interpretation from other sources.

It is a well-recognised principle of interpretation that the meaning of a term used in a statute depends largely, if not wholly, on the context and its collocation.

Craies on Statute law, 5th edition, page 160, relied on.

Appeal under clause 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Rajagopala Ayyangar, dated 16th August, 1956, in Appeal No. 164 of 1956 preferred against the decree of the Court of the Subordinate Judge, Thanjavur, in O.S. No. 112 of 1954.

R. Sundaralingam, for Appellant.

R. Gopalaswami Ayyangar and *V. Ratnam*, for Respondents.

When the appeal came for hearing before the Bench (*Rajamannar C.J.* and *Basheer Ahmed Sayeed, J.*) the Court made the following order of reference to a Full Bench, delivered by

Rajamannar, C.J.—After having heard learned counsel for the appellant for some time and having considered some of the decisions bearing on the point, we think that there should be an authoritative ruling on the construction of section 9-A (10) (ii) (*b*) of the Madras Agriculturists Relief Act in its application to facts such as are present in the case before us. This reference, however, should not be understood to mean that we are convinced that any of the decisions cited to us requires reconsideration. The question which has been raised in this case is likely to arise in numerous other cases relating to usufructuary mortgages, and the language of the provision referred to above is by no means clear. In the circumstances, we think that the best course is to post the Letters Patent Appeal before a Full Bench for decision. Ordered accordingly.

In pursuance of the order of reference the appeal then came on for hearing before a Full Bench (*Rajamannar, C.J.*, *Ramachandra Iyer* and *Venkatadri, JJ.*).

R. Sundaralingam, for Appellant.

R. Gopalaswami Ayyangar and *V. Ratnam*, for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal, which involves the determination of certain important questions in the construction of section 9-A of the Madras Agriculturists Relief Act, 1938, (referred to as the Act) arises out of a suit for redemption of an usufructuary mortgage instituted by the 1st respondent. One Kandaswami, who was the original owner of the properties concerned in the suit, created thereon in favour of the appellant on 26th April, 1927, a mortgage with possession for securing a loan of Rs. 6,000. The document of mortgage stipulated that the mortgagor was to pay and redeem the properties within a period of three years, and that the mortgagee was to retain possession of the properties enjoying the usufruct till redemption. The mortgagee who obtained possession, leased back the properties to the mortgagor.

On the day following the mortgage, on 27th April, 1927, Kandaswami executed a second but simple mortgage over the same properties in favour of Janaki the daughter of the appellant. Some years later, the appellant who borrowed certain monies from the 8th defendant executed a simple mortgage in favour of the latter over some of her properties, one of the items mortgaged being the first mortgage right of the appellant over the suit properties. That document is dated 19th April, 1941. Thus a sub-mortgagee was created over the suit property on that day.

In the same year Janaki filed a suit on the basis of the mortgage (second mortgage in her favour) O.S. No. 273 of 1941 on the file of the District Munsif's Court, Mannargudi. In due course she obtained a decree, and brought the suit properties to sale. The 1st respondent purchased the suit property in the Court sale that ensued, subject to the usufructuary mortgage dated 26th April, 1927, for a sum of Rs. 3,000. Thereafter he, as the owner of the equity of redemption, instituted the suit out of which this appeal arises.

In the plaint the first respondent claimed that he was an agriculturist entitled to the benefits of the Act, and that in view of the fact that 27 years had elapsed since the date of the mortgage, the mortgage amount payable would be only Rs. 400 (2/30 of Rs. 6,000), the balance of the debt having been statutorily discharged by the provisions of section 9-A of the Act. The appellant did not deny the fact that the 1st respondent was an agriculturist, but she contested the claim to redeem at the reduced amount on the ground that the scaling down provisions contained in the Act would not apply to the present case by virtue of the exemption provided in section 9-A (10) (ii) (*a*) and (*b*). It was also claimed that the first respondent had defaulted in the payment of rent, and that at least 3 years rent which was in arrears should be directed to be paid as a condition of redemption. The learned Subordinate Judge accepted the first respondent's case that the mortgage debt should be scaled down and that only a sum of Rs. 400 was payable: he also accepted the case of the appellant in regard to the arrears of rent due, which he ascertained as Rs. 990 and passed an appropriate preliminary decree for redemption. Both the appellant and the first respondent respectively filed an appeal and a memo. of cross-objections to this Court from the decree in so far as it was against them. Rajagopala Iyengar, J., before whom the matter came up for hearing, upheld the view of the trial Court that the mortgage debt stood discharged to the extent of 28/30 thereof. The learned Judge, however, vacated the decree for arrears of rent, as in his view there was no evidence to support that claim. On the former aspect of the case the learned Judge held that neither of the clauses in sub-sections (10) (ii) (*a*) and (*b*) would apply to the present case, and that there was nothing to prevent the operation of section 9-A (3) on the mortgage debt. The correctness of that view is challenged in this appeal by the mortgagee.

When the appeal came up before us, the learned counsel for the appellant took yet another point, namely, that section 9-A would apply to usufructuary mortgages strictly so called coming within the definition of the term in section 58 (*d*) of the Transfer of Property Act and the suit mortgage which contained a personal covenant and was only an anomalous mortgage would not come within its ambit so as to

entitle the mortgagor to claim the benefit of section 9-A. This contention was not raised at earlier stages of this litigation. But the point taken is directly covered by the decision of a Bench of this Court in *Tirumalpad* v. *Krishnan*[1]. Doubts have, however, been expressed as to the correctness of that decision. As the point involved is one of importance, we permitted learned counsel to raise the objection notwithstanding the fact that it was not taken earlier than now.

The contentions raised in support of the appeal are reflected in the following questions which have to be considered :

(1) Whether section 9-A of the Act will apply to all mortgages by virtue of which the mortgagee is entitled to remain in possession of the property mortgaged or only to usufructuary mortgages as defined in section 58 (*d*) of the Transfer of Property Act ;

(2) Whether section 9-A (10) (ii) (*a*) would apply to all sales of equity of redemption, whether by act of parties or by operation of law, that take place during the specified period or only to sales effected by act of parties ;

(3) Whether section 9-A (10) (ii) (*b*) would cover cases of all alienations of the mortgagee's right, be it a sale or merely a mortgage, or only to cases where there has been an absolute transfer of the mortgagee's right either in whole or part.

The Madras Agriculturists Relief Act, 1938, which statutorily wiped out the outstanding interest and provided for the application of the rule of damduput on certain debts due from agriculturists, did not apply to mortgages by virtue of which the creditor was entitled to remain in possession of the mortgaged property without there being any stipulation as to interest. Section 10 (2) of the Act expressly exempted from the operation of the scaling down provisions such mortgages. Legislation was, however, enacted subsequently granting relief to indebted agriculturists who had executed what in common parlance was known as usufructuary mortgages. Act XXIII of 1948 which amended the Act, contained section 9-A which provided for a statutory discharge of mortgages with possession in which there was no stipulation as to payment of interest. It is needless to point out that where interest had been stipulated, the debtor could obtain relief under the original Act itself. Section 9-A, as enacted by amending Act XXIII of 1948, was repealed and re-enacted with certain modifications by Act XXIV of 1950, the relevant portion of which will be set out hereafter. The principle underlying the section is that the creditor should not get more than what the rule of damduput permits and a mortgagee in possession could be reasonably expected to realise by 30 years enjoyment of the mortgaged property, the principal amount and also interest equal to that amount. Broadly stated, the section provides for complete discharge of the debt where a mortgagee has been in enjoyment of the property for 30 years ; where the period of enjoyment is less than that period the mortgage amount will be reduced proportionately. The mortgagor is enabled to redeem the property without any payment where the mortgagee has been in possession for 30 years and more. In case the period of enjoyment is less, the mortgagor can pay a proportionate amount of the principal sum and redeem notwithstanding any stipulation in the deed as to the time for redemption. The section is enacted in general terms ; but from the context it is clear that it would apply only where the debtor is an agriculturist. It does not apply to mortgages executed after 30th September, 1937.

The provision was undoubtedly intended to benefit the agriculturist debtor : its unrestricted operation is capable of resulting in unintended benefits to some or hardships to some others. As we stated earlier, prior to the enactment of section 9-A mortgages with possession where no interest was stipulated were exempt from the operation of the original Act. Therefore nobody would or could have anticipated at that time such an expropriatory legislation, but on the contrary mortgagors and mortgagees would have entered into transactions on the faith of the protection offered under section 10 (2) of the Act. Transfers for consideration of the equity of

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1. (1956) 2 M.L.J. 46.

redemption or of the mortgagee's right might have taken place. It was essential that safeguards should be made in such cases. Section 9-A, therefore, provides for certain exemptions, two of which we have to refer to while dealing with the later two of the questions stated above.

It will be convenient at this stage to refer to the relevant portion of section 9-A.

" *Section* 9-A (1).—This section applies to all mortgages executed at any time before the 30th September, 1947, and by virtue of which the mortgagee is in possession of the property mortgaged to him or any portion thereof.

(*a*) Where no rate of interest is stipulated for as due to the mortgagee or

(*b*) Where a rate of interest is stipulated for as due to the mortgagee in respect of the principal amount secured by the mortgage or any portion thereof, in addition to the usufruct from the property or in respect of any other sum payable to the mortgagee by the mortgagor in his capacity as such.

Explanation.—A mortgagee shall be deemed to be in possession of the property mortgaged to him or any portion thereof, notwithstanding that he has leased it to the mortgagor or any other person.

2. ....

3. Where the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of less than thirty years, the mortgagor shall not be entitled to redeem the mortgage, unless he pays to the mortgagee.

(i) the difference between the principal amount secured by the mortgage and an amount bearing to the principal amount the same proportion as the period during which the mortgagee has been in possession bears to thirty years :

(ii) ....and

(iii) all other sums payable to the mortgagee by the mortgagor in his capacity as such, together with interest, if any, due thereon."

* * * * * *

Sub-section (10)—Nothing contained in this section, except sub-sections (1) and (2) shall apply to any mortgage :

" (i) ....

(ii) ....in the cases mentioned below—

(*a*) where during the period after the 30th September, 1937, and before the 30th January, 1948; the equity of redemption in the property subject to the mortgage has devolved either wholly or in part on a person, by or through a transfer *inter vivos* either from the original mortgagor or from a person deriving title from or through such mortgagor otherwise than by a transfer *inter vivos* then to the whole or such part, as the case may be.

(*b*) Where, during the period aforesaid the mortgagee or any of his successors-in-interest has transferred either wholly or in part mortgagee right in the property *bona fide* and for valuable consideration, then, to the whole or such part, as the case may be :

Provided that the transferee of a mortgagee shall not be entitled to recover in respect of such mortgage, anything more than the value of the consideration for the transfer ; but nothing herein contained shall in cases where the property or portion thereof has been leased back to the mortgagor, affect the right of the transferee to recover the rent, if any, due under the lease, if such rents have not become barred by limitation under any law for the time being in force.

(*c*) Where the mortgagee's interest in the property subject to the mortgage or any part of such interest belonged to, or devolved on, two or more persons and during the period aforesaid, a partition has taken place among such persons, then, to the whole or such part of the interest as the case may be."

The first of the questions set out above concerns the interpretation of section 9-A (1) which makes the provisions of the section applicable to all mortgages by virtue of which the mortgagee is in possession of the property. The terms of the section are wide enough to bring within its ambit not merely the usufructuary mortgage as defined in section 58 (*d*) of the Transfer of Property Act but other mortgages which involve a transfer of possession of the property to the mortgagee, *e.g.*, mortgage by conditional sale, simple mortgage, usufructuary mortgage, etc. In *Tirumalpad* v. *Krishnan*[1] A Bench of this Court had to consider whether the provisions of section 9-A would apply to a Malabar *othi* which partook the character of a mortgage as well as of a lease. The distinctive features of such an *othi* are that the mortgagee is entitled to remain in possession of the property and the mortgage can be redeemed after a period of 12 years; The mortgagee has a right of pre-emption as well. There are also certain other features which need not be referred to now. The learned Judges

1. (1956) 2 M.L.J. 46.

held that the transaction in that case did not partake the character of an usufructuary mortgage, pure and simple but was an anomalous mortgage. They further held that the scaling down provisions contained in section 9-A would apply only to usufructuary mortgages coming within the definition of the term in section 58 (*d*) of the Transfer of Property Act.

Substantially three reasons have been given for restricting the application of section 9-A to usufructuary mortgage alone. The first is that section 9-A as enacted by Act XXIV of 1950 is not different in regard to its scope from its precursor, namely, section 9-A of Act XXIII of 1948, and as the latter provision expressly dealt only with usufructuary mortgages properly so called, the operation of the latter should be restricted likewise. We are by no means sure that such a method of approach is at all permissible where the terms of section 9-A as enacted in Act XXIV of 1950 are clear and explicit, expressly stating that they apply to all mortgages with possession. But even assuming that the previous history of the section can be looked into to ascertain its scope, the view that section 9-A as enacted by Act XXIII of 1948 applied only to usufructuary mortgages does not appear to be correct. The section and its marginal note no doubt referred only to usufructuary mortgages; but appended to the section was an explanation which stated that the term " usufructuary mortgage " as used in the section meant " a mortgage by virtue of which the mortgagee is in possession of the property mortgaged where no rate of interest is stipulated as due to the mortgagee. When Act XXIV of 1950 redrafted and enacted section 9-A in its present form, the terms of the explanation was incorporated in the body of the section after deleting the term ' usufructuary mortgage ' thus making the intention of the Legislature more clear than before.

The second reason given for adopting a construction restricting the operation of section 9-A is, that the Statement of Objects and Reasons of Act XXIII of 1948 showed that an unlimited scope was not intended by the draftsman. Where the terms of the section are clear, as in this case, there is no scope for referring to the Statements of Objects and Reasons as an aid to interpretation. It is no doubt true that in certain cases the circumstances attending the enactment of a statute can be looked into for the purpose of ascertaining the mischief which it intended to remedy, the cure provided therefor with a view to adopt such interpretation as would carry out the true intent. But those considerations do not exist here. Further, there is nothing in the Statement of Objects and Reasons to indicate that the term " usufructuary mortgage " was not to include other mortgages under which the mortgagee is allowed to be in possession of the property. On the other hand, the Select Committee's Report specially stated that an usufructuary mortgage under section 9-A had not the same meaning that it had under the Transfer of Property Act.

The learned Judges then relied on the marginal note to the section as indicating its scope. The marginal note found in the present section is a re-production of the marginal note contained in Act XXIII of 1948, namely " Special provision in respect of usufructuary mortgage ". In the earlier Act the term " usufructuary mortgage" had been defined: but that has been repealed as the same had been incorporated in the enacting part of Act XXIV of 1950. In so doing the draftsman appears to have forgot to amend the marginal note suitably. That, however, cannot affect the interpretation of the section. The marginal note which is not a part of the section can afford no aid to the construction of it, particularly when there is no ambiguity. The learned Judges were alive to this principle, but they regarded that the marginal note "would be of some assistance to show the drift or trend of the section to elucidate and illumine the meaning when there is any doubt ". The words of the section are, in our opinion, precise and unambiguous and there is no justification for seeking any aid for its interpretation from other sources. We are, therefore, of opinion that the reasons which induced the learned Judges in *Tirumalpad* v. *Krishnan*[1], to give a restricted operation to section 9-A cannot be accepted and

1. (1956) 2 M.L.J. 46.

that the section will apply to all mortgages by virtue of which the mortgagee is in possession of the property mortgaged.

It then becomes necessary to consider whether the suit mortgage is exempted from the operation of the scaling down provisions contained in sub-section (10) (ii) (*a*). For the appellant it is contended that the exemption clause contained therein would cover not only a sale *inter partes* whereby the mortgagor conveyed the equity of redemption to another but to involuntary sales (*e.g.* Court sales) as well. This contention did not find acceptance with Rajagopala Iyengar, J., who agreeing with the observations of Krishnaswami Naidu, J., in *Benjamin* v. *Devadoss*[1], held that the provisions of sub-section (10) (ii) (*a*) would have only a limited application to a sale of equity of redemption *inter partes*. *Benjamin* v. *Devadoss*[1], was a case where there was a Court sale of a mortgagee's right. In considering the applicability of sub-section (10) (ii) (*b*) the learned Judge held that the term ' transfer ' occurring in that sub-section should be the result of an act of the parties. In arriving at the conclusion, the learned Judge relied on the use of the word ' transfer ' in sub-section (10) (ii) (*a*). Reference was also made to section 5 of the Transfer of Property Act where transfer was defined as the act of the parties where the term ' *inter vivos* ' was employed. With great respect to the learned Judge, we cannot agree with this method of interpretation. The Transfer of Property Act relates only to transfers by act of parties and not to those by operation of law ; the definition of the term 'transfer' contained in section 5 thereof which is statedly made for the purpose of that enactment, cannot, where the context does not justify, apply to the Madras Agriculturists Relief Act which is a special statute aiming at giving relief to certain agriculturists debtors and which provides also for certain safeguards against an unrestricted application of its expropriatory provisions. It is a well accepted principle of interpretation that the meaning of a term used in a statute depends largely if not wholly on the context and its collocation, *etc.*,. As stated in Craies' Statute Law 5th Edition, page 160:

"Except in mathematics" said Gove, J. in *Wakefield, L. B.* v. *Lee*[2], "it is difficult to frame exhaustive definition of words": consequently as the Court said in *E.* v. *Stall*[3], ' the meaning of ordinary words when used in an Act of parliament is to be found not so much in the strict etymological propriety of language, nor even in the popular sense as in the subject or occasion on which they are used and the object which is intended to be attained."

Sub-section (10) (ii) (*a*) of section 9-A says " where the equity of redemption has devolved....on a person by or through a transfer *inter vivos*....from the original mortgagor ". The term ' *inter vivos* ' means between living persons : but the section does not merely refer to a transfer *inter vivos* thereby implying that the transaction should be made between the persons named in a document as vendor and purchaser. It speakes of a devolution by transfer from the mortgagor and employs the passive voice suggesting thereby that it would comprehend cases where there has been no act of the mortgagor. The terms of sub-clause (*a*) is in contrast with that in the succeeding sub-clause (*b*) which expressly says where " mortgagee......has transferred ". It is implicit that " devolution by transfer *inter vivos* " is used in contradistinction with devolution under law and should therefore include all cases of tranfer whether it be by the act of the party or a forced one under the law. That this view conforms to the object of the exemption contained in sub-section (10) (ii) will be clear from the following. A person who purchased the equity of redemption in a property subject to an usufructurary mortgage (during the period mentioned in the sub-section), whether by private treaty or in Court auction, would have assumed that the entire mortgage amount should be paid to obtain redemption, having regard to the then existing law and would have stipulated or bid at the auction at a price after making full allowance for the mortgage amount. If the scaling down provisions were to apply to such a case, it is not the agriculturist debtor that would benefit (for he had parted with or lost his interest) but the purchaser who did not pay the full price for the property. Sub-section (10) (ii) provides an exemption from the operation of the statutory discharge enacted for earlier. On principle there can be no distinction between a

1. (1954) 1 M.L.J. 537.
2. (1876) 1 Ex. D. 336. 343.
3. (1822) 1 B. & C. 123, 136.

case of a private and a compulsory sale of the equity of redemption, for in either case the scaling down provision would only benefit the purchaser. Indeed there is greater reason for not giving the benefit of the scaling down provisions to a Court auction purchaser than to a private purchaser, for it is possible to conceive that in certain circumstances a private purchaser might be obliged to transmit the benefit of the scaling down to his vendor, while in the former case the benefit of the reduced liability would be purely an unexpected one to the purchaser at the Court sale. Sub-section (10) was enacted to cure a mischief which an unrestricted application of section 9-A might entail. The principle of interpretation as stated by Lord Lindley, M.R. in *Thomson* v. *Lord Clanmorris*[1], is :—

> " In construing any statutory enactment regard must be had not only to the words used but to the history of the Act and the reasons which led to it being passed. You must look at the mischief which had to be cured as well as the cure provided."

The mischief sought to be remedied was to prevent an undeserved benefit to a purchaser : the cure provided could be effective only if the auction purchasers are also brought within it. In our opinion, the reason behind sub-section (10) (ii) (*a*) and the construction thereof after giving effect to the presence of the words " devolution by transfer from the mortgagor ", alike point to the conclusion that the Legislature did not intend to make any distinction between a purchaser from the mortgagor and one who obtained the equity of redemption in a Court sale. We are unable to accept the view expressed by Krishnaswami Nailu, J. in *Benjamin* v. *Devadoss*[2], and of the decision of Rajagopala Iyengar, J. on this point as correct.

What then remains to be considered is whether the suit mortgage could be held to be exempt from being scaled down by virtue of sub-section (10) (ii) (*b*), by reason of the fact that the appellant had during the period specified therein created a sub-mortgage in favour of the 8th respondent. It is contended for the appellant that a mortgage of the mortgagee's right would be a transfer of a part of the mortgagee's right and that therefore, sub-section (10) (ii) (*b*) would save the debt from being scaled down. We cannot agree that the creation of a mortgage would amount to a transfer either of the whole or part of the property mortgaged. A mortgage is a transfer of an interest in property. When a mortgagee creates a sub-mortgage, he creates in favour of the sub-mortgagee only an interest in the mortgage right by way of security for the debt. A transfer of an interest in the property by way of security will not be the same as the transfer of it in part. Further the word ' transfer ' as used in sub-section (10) (ii) can only mean the transfer of the entire interest of the owner, whether it be in the whole of the property or of a part of it. For example sub-clause (*a*) to which reference had been made already refers to devolution by transfer, the term ' devolution ' implying that the entire interest has been transmitted. A similar interpretation has to be given in clause (*b*) as well. In *Velu Mudaliar* v. *Rajaram Karayalar*[3], Ramaswami J. held that the provisions of sub-section (10) (ii) (*b*) would not be attracted where the mortgagee merely created a sub-mortgage. This view was affirmed later by Govinda Menon and Ramaswami, JJ. in *Rajagopala Naidu* v. *Kunjammal*[4], where it was observed that a transfer in whole of the mortgagee's rights, meant an absolute conveyance or renunciation of the whole bundle of rights of the mortgagee in the entire mortgaged property. The learned Judges also pointed out how a contrary conclusion would give rise to anomalies. In *Narayana Dikshithar* v. *Sundaresa Sastrigal*[5], Panchapakesa Aiyar, J. followed that decision and held that the execution of a sub-mortgage by the mortgagee would not amount to a transfer of the rights of latter in whole or in part. Agreeing with the view of the learned Judges stated above, we are of opinion that the terms of sub-section (10) (ii) (*b*) will not be attracted to this case.

In view, however of the fact that our answer to the second question is in favour of the appellant, the mortgage debt will not be saved from the operation

1. L.R. (1900) 1 Ch. 712 at 725.
2. (1954) 1 M.L.J. 537.
3. (1955) 69 L.W. 248.
4. (1956) 1 M.L.J. 589.
5. (1958) 2 M.L.J. 587.

of section 9-A (3) and the entire mortgage money has to be paid by the first respondent before he can be allowed to redeem the mortgage.

The other objection taken by the appellant to the judgment of Rajagopala Iyengar, J., namely, whether the first respondent is liable for any amount as arrears of rent, remains to be considered. The appeal will be adjourned to 23rd January, 1961, for determination of that question and for final disposal before a Division Bench.

P.R.N. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

V.N. Swaminathan (Minor) represented by T.S. Subramania Pillai as next friend .. *Appellant**

v.

G.S. Sundara Vandayar and another .. *Respondents.*

Madras City Tenants Protection (Amendment) Act (XIII of 1960), sections 2 (1) (ii) and (iii) and 9—Validity—If unconstitutional.

Section 2 (i), (ii) and (iii) of the Madras City Tenants Protection (Amendment) Act, 1960, classifying buildings, into residential and non-residential for purposes of protection is valid and is not discriminatory or unconstitutional. Section 9 of the Act giving retrospective operation to the amendment is not opposed to Article 19 (1) (*f*) or 31 of the Constitution of India.

Appeal against the decree of the Court of the Subordinate Judge of Thanjavur dated 7th November, 1959 in Original Suit No. 51 of 1958.

V.P. Raman for Appellant.

R. Gopalaswami Ayyangar and *K.N. Balasubramanian*, for Respondents.

The Advocate-General (*V.K. Tiruvenkatachari*) and The Government Pleader (*A. Alagiriswami*), for the State.

The Judgment of the Court was delivered by

Jagadisan, J.—The appeal and the civil revision petition arise out of a suit in ejectment filed by the plaintiff in O.S. No. 51 of 1958 on the file of the Court of the Subordinate Judge of Tanjore in respect of a vacant site lying within the municipal limits of Tanjore town and comprised in town Survey No. 2862.

The plaintiff was admittedly the owner of the property but the defendant resisted the suit claiming benefits under the Madras City Tenants Protection Act III of 1922. This Act was extended to the municipal town of Tanjore by notification of the State Government dated 28th March, 1956 in exercise of its powers under Madras Act XIX of 1955 amending Madras Act III of 1922. The defendant filed in the Court below two applications, I.A. No. 637 of 1958 and O.P. No. 6 of 1959 under section 9 of the Act for fixing the price of the suit site and for directing the plaintiff to convey the site to him on payment of the price that may be fixed by the Court. The plaintiff disputed the defendant's right to obtain the benefit of the Act contending that the defendant was not a tenant, that the defendant was estopped by his conduct from asserting any right under the Act and that the defendant having pleaded a fresh tenancy between himself and the plaintiff after the date of the notification extending the Act to the Tanjore Town was disentitled to any relief under the Act.

The learned Subordinate Judge of Tanjore found that the defendant was a tenant entitled to the benefits of the Act, and the suit was not maintainable as the requisite notice under the terms of section 11 of the Act was not given by the plaintiff. He accordingly dismissed the suit. The learned Subordinate Judge fixed the market value of the suit site as Rs. 12,000 and gave relief to the defendant under the Act whereby the plaintiff was compelled to receive the sum of Rs. 12,000 and to

* Appeal No. 3 of 1960 and C.R.P. No. 55 of 1960. — 3rd March, 1961. (12th Phalguna, 1882 Saka).

convey the suit site to the defendant. The plantiff has preferred the above appeal against the judgment and decree of the Subordinate Judge non-suiting him and has preferred the civil revision petition against the order directing him to convey the property for Rs. 12,000 in O.P. No. 6 of 1959.

During the pendency of the above proceedings in this Court the Madras City Tenants Protection Act (Madras Act III of 1922) was amended by the Madras Act XIII of 1960. This amending Act was published in Part IV, section 4 of the *Fort St. George Gazette*, dated 27th July, 1960. The suit site was leased out for non-residential purposes by the predecessors-in-interest of the plaintiff to the defendant. Madras Act XIII of 1960 has now confined the operation of the parent Act, Madras Act III of 1922 only to residential buildings in the Tanjore Municipal Town. The amending Act has also been made expressly retrospective in operation by section 9 of the Act. The effect of this legisalation is to govern the present proceedings in this Court and to disentitle the defendant from claiming any relief under the Madras City Tenants Protection Act. The learned counsel for the respondent challenged the relevant provisions under Madras Act XIII of 1960 affecting the rights of the respondents as being obnoxious to the fundamental rights guaranteed under the Constitution of India, and hence unconstitutional. We issued notice to the State Government as the vires of a legislative enactment was called in question. The State of Madras filed C.M.P. No. 210 of 1961 in this Cout for being impleaded as a respondent in the appeal. This application was granted by order of this Court dated 10th January, 1961. We have heard the learned Advocate-General on behalf of the State Government on the constitutional issue raised on behalf of the defendant respondent.

The suit property originally belonged to a Trust called Sri Rama Vilas Dharmam *alias* Sengammal Bai Trust. This trust was administered by two women, Kaveri Bai and Gopi Bai. On 23rd April, 1945 the trustees leased out the property to one Venugopala Chettiar under Exhibit B-1, which is a registration copy of the rent deed, for a period of 5 years stipulating a rent of Rs. 65-per month. The lessee, Venugopala Chettiar carried on business of running a rice mill and for the purpose erected a superstructure and planted machinery on the suit site. This business appears to have been run in the name and style of Swminathan Mills by Venugopala Chettiar in partnership with the defendant in this suit and some others. The defendant obtained an assignment on 12th November, 1949 from Venugopla Chettiar of the entire business as a going concern for valuable consideration. This assignment is evidenced by Exhibit B-2 in the case. Thereafter the defendant became the sole proprietor of the business and he carried it on by obtaining periodical licence from the municipality (vide Exhibit B-23 to Exhibit B-26, licences issued by the Municipality). The defendant entered into a rental agreement (Exhibit B-3) with the trustees aforesaid on 19th April, 1951. This was for a period of 3 years, and the rent fixed was the sum of Rs. 65 - per month. After the expiry of this lease there was a further lease for a period of 3 years between the trustees and the defendant as evidenced by Exhibit A-9 dated 19th April, 1954. The period fixed under this lease was also three years and the rent payable was the same as that under the previous lease. The defendant paid an advance of three months rent and agreed to surrender vacant possession on 19th April, 1957 after removing the superstructure on the land. The lease deed expressly recites that the lease was for the purpose of carrying on ground-nut business. The defendant did not surrender possession on the expiry of the lease. The persons in management of the trust wanted an enhanced rent and there was correspondence between the defendant and one Hari Rao who was acting on behalf of the trust as to the rent payable by the defendant for his continuance as lessee of the land. There is evidence to show that as a result of negotiation between the representative of the trust and the defendant, the defendant agreed to pay an enhanced rent of Rs. 85-per month.

The plaintiff purchased the property from Gopi Bai, the sole surviving trustee of the trust under the registered conveyance, Exhibit A-1 dated 2nd March, 1958. The plaintiff issued a notice to the defendant through his counsel at Tanjore demand-

ing surrender of vacant possession of the property on or before 19th June, 1958. The notice is Exhibit A-5 and is dated 17th May 1958. Under that notice the defendant was directed to remove all superstructure on the land at his cost. The defendant acting through his counsel caused a reply notice to be sent, Exhibit A-6, dated 26th May, 1958, claiming the benefit of the Madras City Tenants Protection Act.

The defendant averred in that reply notice that the previous owners of the property had entered into a fresh lease with him by which he was to pay an enhanced rent of Rs. 85-per month and was to remain in possession as lessee for a period of 10 years. The defendant remitted a sum of Rs. 255-to the plaintiff by a money order stating that the amount represented rent due and payable by him for the three months of March, April, and May, 1958. The plaintiff received the amount of the money order and the money order receipt is Exhibit B-17 dated 7th June, 1958. The defendant sent a further sum of Rs. 85 - to the plaintiff by money order as and for rent payable by him for the month of June, 1958. This time the plaintiff as evidenced by Exhibit B-191 refused to receive the money order. The plaintiff next sent a notice through his counsel at Pattukottai to the defendant, Exhibit A-7 dated 2nd August, 1955, wherein he sought to explain his conduct in receiving the amount of rent sent by money order for the three months of March, April and May, 1958. The explanation of the plaintiff was that he was busy with several matters connected with the management of his estate and that it took him sometime to ascertain his true position in the matter. The plaintiff generously offered that he was ready to refund the sum of Rs. 255 to the defendant. The plaintiff reiterated his demand for recovery of possession of the land and gave time to the defendant to surrender vacant possession till 1st September, 1958. The defendant's reply to Exhibit A-7 was Exhibit A-8 dated 11th August, 1958. Therein the defendant took up the position that he had become a tenant of the plaintiff in view of the receipt of the rent for three months by the plaintiff unconditionally and without any protest. He claimed that he was protected by eviction by reason of the provisions of the Madras City Tenants Protection Act.

The parties to the suit also let in oral evidence but we do not think it necessary to refer to it as nothing turns upon such evidence, and as the evidence is not material for the disposal of the appeal.

It was contended on behalf of the plaintiff in the Court below that the defendant could not claim the benefit of the Act as according to him there was a fresh tenancy agreement between him and the original owners of the property after the Act came to be made applicable to Tanjore, but the learned Subordinate Judge who tried the suit overruled this contention of the plaintiff holding that he could not validly set up an oral lease for a period of ten years as the provisions of section 107 of the Transfer of Property Act required a registered document where the period of the tenancy fixed is more than a year. He however held that the defendant was a tenant entitled to the benefits of the Act presumably because either he became a tenant under the plaintiff, who accepted rent from him for a period of three months, or as he was a tenant holding over in which case also he was entitled to relief under the Act.

We do not propose to go into the correctness or otherwise of the findings of the learned Subordinate Judge on the issues raised before him in view of the statutory amendments of the Act brought in by Madras Act XIII of 1960. Mr. R. Gopalaswamy Iyengar, learned counsel for the respondent, contended that the suit was not maintainable as there was no proper notice to quit by the plaintiff to the defendant, and that the defendant was entitled to such notice under the provisions of the Transfer of Property Act even if it were to be held that he was not entitled to the benefit of the Madras City Tenants Protection Act as a result of the recent amendment. We are unable to agree with this contention. We are clearly of opinion that Exhibits A-3 and A-7 notices sent on behalf of the plaintiff to the defendant, demanding delivery of vacant possession from the defendant constitute valid notices terminating the relationship of landlord and tenant between the parties. Under Exhibit A-5 the plaintiff issued notice to quit to the defendant on 17th May, 1958 calling for surrender of possession on or before 19th June, 1958. After the expiry of the three year period of lease as provided for under Exhibit A-9 the defendant can at best be deemed

only to be a monthly tenant from 19th April, 1957 onwards. Section 106 of the Transfer of Property Act provides for 15 days notice expiring with the end of a month of the tenancy to terminate a lease from month to month. The receipt of the sum of Rs. 255 representing the rent due for the three months of March, April, and May, 1958 by the plaintiff may not have the result of bringing about a fresh tenancy between the plaintiff and the defendant. The defendant had time to surrender possession of the property till 19th June, 1958 in accordance with the terms of Exhibit A-5 sent by the plaintiff. The plaintiff was entitled to receive rent so long as the defendant continued to occupy the premises. The notice sent by the plaintiff for the second time under Exhibit A-7 was also in conformity with law if it were to be held that the defendant became a monthly tenant from the first of every month by reason of the alleged fresh tenancy said to have been brought about by the remittance and acceptance of the money order amount of Rs. 225. The second notice was issued on 2nd August, 1958 demanding possession to be surrendered by the defendant on or before first September, 1958. There is no substance in the contention urged on behalf of the respondent that the suit is not maintainable for want of due notice to quit in accordance with the provisions of the Transfer of Property Act.

Then it was contended on behalf of the respondent that the lease as evidenced by Exhibit A-9 in the case between the original owners of the property and the defendant was a lease for manufacturing purposes and that such a lease should be deemed to be one from year to year and could be terminated only by issuing six months notice expiring with the end of a year of tenancy. The object of the lease as set out in Exhibit A-9 is only for the purpose of carrying on groundnut business. It is plain that the lease is not one for manufacturing purposes, and that the plaintiff was not obliged to give six months notice expiring with the end of a year of the tenancy.

Section 9 of Madras Act XIII of 1960 is as follows :—

"Every proceeding pending before any Court, other than a proceeding relating to any property situated in—

(i) the City of Madras,

(ii) the municipal towns of Coimbatore, Madurai, Salem and Tiruchirappalli, and

(iii) any village within five miles of the City of Madras or of the municipal towns aforesaid, on the date of the publication of this Act in the *Fort St. George Gazette*, and instituted under the provisions of the principal Act, shall in so far as such proceeding relates to non-residential buildings abate, and all rights and privileges which may have accrued immediately before such date to any person in respect of any property situated in any area other than the areas referred to above by virtue of the principal Act, shall, in so far as they relate to non-residential buildings, cease and determine and shall not be enforceable :

Provided that nothing contained in this section shall be deemed to invalidate any suit or proceeding in which the decree or order passed has been executed or satisfied in full before the date mentioned in this section."

This provision clearly governs the pending proceedings in this Court as it is not pretended that the decree passed by the Court below has been executed or satisfied in full before the date of commencement of the amending Act. It is also not disputed that the building on the site forming the subject-matter of the appeal is constructed for non-residential purposes. If the amending Act, XIII of 1960, were to apply, the plaintiff will be entitled to a decree for recovery of possession of the suit site and the defendant will not be entitled to obtain a conveyance of the property from the plaintiff as directed by the Court below. This result must follow if that Act is not unconstitutional as impugned by the defendant-respondent.

The following provisions of Madras Act III of 1922 as amended by the Madras Act XIII of 1960 are impugned as unconstitutional.

Section 2 (1).—" Building means any building, hut or other structure, whether of masonry bricks, wood, mud, metal or any other material whatsoever used—

(1) for residential or non-residential purposes, in the City of Madras in the municipal towns of Coimbatore, Madurai, Salem and Tiruchirappalli and in any village within five miles of the City of Madras or of the municipal towns aforesaid, and

(ii) for residential purposes only, in any other area, and includes the appurtenances thereto."

The previous definition of building as it stood before the amendment was as follows :

> "Building includes a house, out-house, stable, latrine, shed, hut and any other such structure whether of masonry, bricks, wood, mud, metal or any other material whatsoever."

As a result of the amendment made by Madras Act XIX of 1955 section 1, clauses (2) and (3) are as follows :—

> " (2) It extends to the City of Madras and State Government may, by notification in the *Fort St. George Gazette*, extend this Act to any other municipal towns and any specified village within five miles of the City of Madras or such municipal town with effect from such date as may be specified in the notification.
>
> (3) This Act shall apply, in the City of Madras, only to tenancies of land created before the commencement of the Madras City Tenants' Protection (Amendment) Act, 1955, and in any municipal town or village to which this Act is extended by notification under sub-section (2), only to tenancies created before the date with effect from which this Act is extended to such town or village."

Prior to the amendment introduced by Madras Act XIII of 1960 the tenant in occupation of a vacant site having a superstructure of his own for residential or non-residential purposes had the benefit of the Act, Madras Act III of 1922, in areas governed by the Act. This benefit accrued to the tenant in Tanjore Town on and from 28th March, 1956 when by a notification of the State Government the Act came to be extended to the municipal town of Tanjore. Every such tenant was entitled on ejectment to be paid as compensation the value of any building which may have been erected by him or by any of his predecessors-in-interest. He was also entitled to be paid the value of trees planted by him on the land and of any improvements made on the land. In a suit for ejectment against the tenant in which the landlord succeeds the Court should ascertain the amount of compensation and direct the landlord to pay the amount in Court within three months from the date of the decree as a condition precedent for obtaining delivery of the property. Default on the part of the landlord to carry out this condition will result in the dismissal of the suit and will operate as a bar to institute a fresh suit for ejectment. The tenant could move the Court having jurisdiction to entertain a suit for ejectment for fixation of reasonable rent for the occupation of the land. The tenant facing a suit in ejectment may apply to the Court for an order that the landlord be directed to sell the whole or part of the land for a price to be fixed by the Court. The amount so fixed could be paid by the tenant in instalments spread over a period of three years or less, exceeding three months, from the date of the order of the Court. No suit in ejectment could be instituted against the tenant until the expiration of three months next after notice in writing had been given to him requiring him to surrender possession of the land and building and offering to pay compensation for the building. To the extent necessary to give effect to the provisions of the Act, the Transfer of Property Act, 1882 is deemed to have been repealed or modified. The tenant was thus the recipient of substantial benefits and privileges under the Act. The tenant of a land for non-residential purposes in the municipal area of Tanjore lost these statutory benefits as he was put outside the Act by the amended definition of 'building' introduced by Madras Act XIII of 1960. The defendant in the case, who is a tenant in Tanjore, occupying land for non-residential purposes, impugns this statutory alteration of the definition of 'building' as violative of Article 14 of the Constitution and hence unconstitutional. His complaint is that the impugned legislation, section 2 (1) (i) and (ii) of the Act is discriminatory in character, as it is an unequal law affecting different parts of the State differently, the tenants for non-residential purposes in the City of Madras, and in the Municipal Towns of Coimbatore, Madurai, Salem and Tiruchirappalli being favoured as against such similar tenants in the other parts of the State. This discrimination is characterised as unjust, and undisguisedly hostile without a semblance of reasonable classification germane to the objects and purposes of the Act, an essentiality without which no statute with inequality writ large on its face can stand the touchstone of the constitutionality prescribed by Article 14 of the Constitution. We have now to examine the soundness of the contention.

Article 14 of the Constitution, the equality clause enshrined in our Constitution, is a favourite missile of attack in the armoury of the champions of fundamental

rights guaranteed under the Constitution, who feel dissatisfied or aggrieved by any legislation. Judicial commentaries on the subject are quite many. The aim of the Article is not to evolve equality out of inequality. It forbids an 'evil eye and an unequal hand' in dealing with equals and insists that like should be treated as alike. The inhibition is

'designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation.' *Pembina Mining Co.* v. *Pennsylvania*[1].

The scope of Article 14 was laid thus by the Supreme Court of India in *Budhan Choudhry and others* v. *The State of Bihar*[2].

"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration."

The Preamble to the Act is as follows:

"Whereas it is necessary to give protection to tenants who in municipal towns and adjoining areas in the State of Madras have constructed buildings on others' lands, in the hope that they would not be evicted so long as they pay a fair rent for the land."

The following is the Statement of Objects and Reasons attached to Madras Act XIII of 1960:

"The Madras City Tenants' Protection Act, 1921 was enacted with the main object of safeguarding the tenants from eviction from residential quarters. In consistence with this object it is proposed to restrict the application of the Madras City Tenants' Protection Act, 1921 (Madras Act III of 1922) to residential buildings only".

The distinction between residential and non-residential buildings is now the creature of Madras Act XIII of 1960. It cannot be gainsaid that persons occupying dwelling houses after erecting superstructures on lands belonging to others stand on a different footing from persons carrying on business having put up their own superstructure on lands of others. The Madras Buildings (Lease and Rent Control) Act makes a distinction between residential and non-residential buildings. The object of the enactment as set out in the Preamble is to give protection to tenants from being evicted lest they should find themselves without a roof to shelter them. The classification of residential and non-residential buildings is therefore permissible as it has a reasonable nexus with the object of the enactment and the evil sought to be eradicated by the passing of the enactment. It is to be remembered however that tenants in particular areas, namely, the City of Madras and the municipal towns of Coimbatore, Madurai, Salem and Tiruchirappalli even in respect of non-residential quarters, have come in for the benefit of the Act and other tenants of such description in other areas have been excluded from such benefit. This is a further classification amongst tenants of non-residential buildings and the question for consideration is whether this classification is permissible and proper. The population of the various municipal towns in accordance with the last Census Report in so far as it is material for the present purpose is as follows:

Madras	..	1,416,056
Madurai	..	361,781
Tiruchi	..	218,921
Salem	..	202,335
Coimbatore	..	197,755
Vellore	..	106,024
Tanjore	..	100,680

It is seen that Madras, Madurai, Tiruchi, Salem and Coimbatore occupy the first five places. The municipal town of Tanjore ranks only as the 7th in the list. The Legislature took this into consideration in conferring protection to tenants of non-

1. 125 U.S. 181, 188. (S.C.).
2. (1955) S.C.J. 163 : (1955) 1 S.C.R. 1045

residential buildings in the first five areas referred to above. It is apparent that having regard to the large population in the first five areas and the large scale commercial activities in these areas, the Legislature thought fit that non-residential quarters occupied by tenants on lands belonging to others should also be afforded relief from being evicted summarily and arbitrarily. We cannot undertake a search for motive in testing constitutionality of an impugned provision in an enactment. The question is whether it is a type of discrimination which is incompatible with any fair conception of equal protection of the laws.

> " Mathematical nicety and perfect equality are not required. Similarity not identity of treatment, is enough. If any set of facts can reasonably be conceived to sustain a classification the existence of that state of facts must be assumed." (*Willis on American Constitution*, page 579).

In adopting this test of reasonable basis for differentiation in any enactment we cannot of course satisfy ourselves by vague reference to the wisdom of the Legislature or by indulging in pure speculation as to what might have been at the back of its mind as pointed out by Chandrasekara Iyer, J., in the decision of the Supreme Court in *Purshottam Govindji Halai* v. *Shree B. M. Desai*[1].

We may usefully refer to the following passage from the decision in *Kotch* v. *Board of River Port Pilot Commissioners*[2].

> " The constitutional command for a state to afford ' equal protection of the laws ' sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. See, e.g., *Tigner* v. *Texas*[3]. Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public. *Atchinson, T. & S.F.R. Company* v. *Matthews*[4]. This selective application cf a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation's objectives. An example would be a law applied to deny a peron a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs or because of any other reason having no rational relation to the regulated activities."

Legislative enactments can be confined to operate within certain territorial limits without offending the rule of equality before the law or equal protection of the laws. The Legislature is determining the reach and scope of particular legislation need not provide abstract symmetry. It may as a matter of fact set apart the class and types of problems according to the needs and as dictated and suggested by experience. (*Weaver on American Constitution*, Page 397). The Legislature is free to recognise degrees of harm and enact measures to combat such harm and may proceed cautiously by introducing such measures in territories where the evil sought to be checked and controlled is most rampant.

The tenants of non-residential buildings in the City of Madras, and in the municipal towns of Coimbatore, Salem, Tiruchi and Madurai have no doubt obtained certain statutory privileges and immunities. But for the grant of such privileges they would be governed by the provisions of the Transfer of Property Act just as much as a like tenant in other areas. Whether the landlords or owners of lands occupied by tenants for non-residential purposes in the areas to which the Act has been made applicable can complain of any discrimination as against them made by the Legislature, or not, we are unable to understand, how it will be open to tenants in the excluded areas to complain of any discrimination as against them by reason of the non-applicability of the Act to the areas occupied by them. But it is really unnecessary for us to express any opinion on the question whether the tenants for non-residential purposes occupying lands in the excluded areas have any *locus standi* to impugn the legislation as we are clearly of opinion that the legislation as such is not hit by Article 14 of the Constitution.

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1. (1956) 1 M.L.J. (S.C.) 51: (1956) S.C.J. 75: (1956) 1 An.W.R. (S.C.) 51 (1955): 2 S.C.R. 887 at 906.
2. 330 U.S. 552.
3. 310 U.S. 141, 147.
4. 174 U.S. 96, 106.

Mr. Gopalaswami Iyengar, learned counsel for the respondent, relied on a recent decision of the Rajasthan High Court in *Brijmohan* v. *State of Rajasthan*[1]. In that case an enactment called the Jaipur Prevention of Unequal Marriages Act, 1948, was made applicable only to persons living within the geographical limits of the old Jaipur State as it was before its integration with the State of Rajasthan. That enactment was challenged as violative of Article 14 of the Constitution. A Division Bench of the Rajasthan High Court pronounced the enactment to be unconstitutional. The impugned enactment interfered with the right of persons to contract marriages irrespective of the disparity in age of the two spouses. The learned Judges were of the opinion that the legislation was *ex facie* discriminatory in character, and that the confinement of its operation to a particular territory cannot be said to be the result of any reasonable classification. We are unable to see the applicability of that decision in testing the constitutionality of the impugned provisions of the Madras City Tenants' Protection Act.

Learned counsel for the respondent contended that the Act having been already applied to the municipal towns of Tanjore by a notification of the State Government, dated 28th March, 1956 there can be no justification for excluding Tanjore Town from the ambit of the operation of the Act by reason of the amendment introduced under Madras Act XIII of 1960. The classification of buildings into the categories of residential and non-residential buildings was conceived of only at the time when the amending Act was passed, and it cannot be said that the Legislature arbitrarily refrained from conferring the benefits of the Act to non-residential tenants in Tanjore Town. Having made the classification in the light of experience gained by the working of the enactment, the Legislature presumably thought that only the tenants of non-residential buildings in the five areas mentioned in the Act deserved protection and not the tenants in areas outside those territories. We therefore hold that section 2 (1), clauses (ii) and (iii) of Madras Act XIII of 1960 are valid and not unconstitutional.

Section 9 of Madras Act XIII of 1960 set out earlier in this judgment was challenged as offending Article 19 (1) (*f*) and Article 31 of the Constitution. The contention urged was that deprivation of rights under the Act which enured in favour of tenants in respect of non-residential buildings in the Tanjore municipal area amounted to deprivation of property and that such deprivation cannot be made arbitrarily without providing for adequate compensation as provided for under Article 31 of the Constitution. The Legislature has an undoubted right to modify, amend or repeal its enactments. Vested rights accruing in favour of the subject under repealed enactments may also be taken by the legislature if it so chooses. A deprivation of a statutory right from a subject cannot be said to amount to taking property or deprivation of property. Section 9 of Madras Act XIII of 1960 has only given retrospective operation to the new enactment and is certainly not expropriatory in character. We are clearly of opinion that section 9 of Madras Act XIII of 1960 is not obnoxious to any of the fundamental rights guaranteed under the Constitution.

The appeal and the Civil Revision Petition are allowed; the judgment and decree of the learned Subordinate Judge in O.S. No. 51 of 1958 and his order in O.P. No. 6 of 1959 are hereby set aside. The plaintiff will have a decree for recovery of vacant possession of the suit property as prayed for by him in the plaint. The defendant will have six months' time from today to deliver possession of the property and to remove his superstructure from the land. The parties will bear their respective costs both here and in the Court below.

This appeal and the Civil Revision Petition having been set down this day for being mentioned the Court made the following

ORDER: This matter was posted before us as in our judgment we did not give any direction with regard to the relief of mesne profits contained in the plaint. The plaintiff-appellant will be entitled to mesne profits at the rate of Rs. 85 per month,

1. A.I.R. 1960 Raj. 118.

which even according to the defendant was the agreed rent payable by him from the date of demand 17th May, 1958 till delivery of possession. Mr. R. Gopalswami Iyengar, learned counsel for the respondent submitted that his clients might have paid some rent for this period. We need not add that if any payment had been made that will go in reduction of the decree for mesne profits now granted.

R.M. *Appeal and petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE KAILASAM.

Sha Rikabdoss Bhavarlal .. *Appellant**

v.

The Collector of Customs, Mysore Bank Buildings, opposite to High Court, Madras .. *Respondent.*

Imports Control Order (1955)—*Electrical insulation material—Separate classification of material as adhesive tape and black insulating tape—If could be deemed to be the same.*

Sea Customs Act (*VIII of* 1878), *section* 167 (8)—*Order of Collector confiscating goods in a case while in similar cases against others there was only a warning—Not an exercise of discretion in a judicial way.*

Though it is true that there could be no estoppel precluding the Customs Authorities from ever correcting a mistaken view taken by them in classifying certain goods under one head or the other, still where there has been a classification of certain goods as ' Adhesive tape ' and 'Black insulating tape', which are treated as separate and distinct and which has been so understood by the importer, the trade and the authorities, it is not open to the authorities to put the 'Black insulating tape' into the category of 'Adhesive tape ' even assuming that the black insulating tape has an adhesive quality. Such goods cannot be taken out of its category simply because it has an adhesive quality and may fall within the other classes of adhesive tape.

Where there was confiscation of goods in the case of one importer and mere letting off with a warning of others similarly placed without giving any reasons why the confiscation was ordered it must be held that the Collector of Customs as a quasi-judicial tribunal had not exercised his discretion judicially and his order should be quashed.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Rajagopalan, dated 8th July, 1960 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 452 of 1958, presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the proceedings in Gr. IVs. 10-274/58 AP., dated 10th March, 1958 on the file of the Collector of Customs, Madras and quash the order made therein.

V. C. Gopalaratnam and *L. V. Krishnaswami Ayyar*, for Appellant.

The Additional Government Pleader (*M. M. Ismail*), for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal from the Judgment of Rajagopalan, J., dismissing Writ Petition No. 452 of 1958 filed by the appellant for the issue of a writ of *certiorari* to quash the order passed by the Collector of Customs, Madras, on 10th March, 1958 confiscating certain goods imported by the appellants on the ground that the goods were imported without a valid licence in contravention of section 3 of the Imports Control Order, 1955 read with sub-section (2) of section 3 of the Imports and Exports Control Act, 1947, and, therefore, an offence under section 167 (8) of the Sea Customs Act had been committed.

The main facts are not in dispute. They can be gathered from the affidavit of one Sirdarmull, the authorised agent of the appellants, Sha Rikabdoss Bhavarlal. Sirdarmull was also the agent for other persons carrying on business similar to that of the appellants. The appellants held a licence granted by the Government of India under the Imports and Exports Control Act, 1947 authorising them to import musical instruments and parts thereof, all sorts. This licence was converted on their application to a licence for the import of electric insulations, etc., excluding 38-II face value restricted items. The approximate value of the goods which could

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* W.A. No. 137 of 1960. 4th May, 1961.
(14th Vaisakha, 1883, Saka).

be imported was fixed at Rs. 1,000. There was an endorsement by the Assistant Controller relating to this conversion which ran thus :

"The import of these goods is subject to the restrictions mentioned in column 6, section 2 of January-June, 1957 Policy."

The material part of that column is as follows:

"Not more than 7½ per cent. of the face value of quota licence or Rs. 500 whichever is higher can be utilised for the import of adhesive tapes."

The relevant item of the Indian Tariff Code schedule is item 38.

"Electric insulations including presspan paper which fall under Item No. 45 of the First Sch dule to the Indian Tariff Act, 1934, but excluding ebonite eosa, tubes and sheets."

In the Index a large number of electric insulations of different varieties are mentioned as covered by this Item 38. They include among others:

(1) Adhesive tapes.

(2) Black insulating tapes.

(3) Cotton insulating tapes.

(4) Glass silk tape.

(5) Rubber tapes.

(6) Impregnated tapes.

In November, 1957, the appellants placed orders for the import of black insulating tape under the converted licence of the total value of Rs. 999. The goods arrived at the Madras Port in December, 1957. The Bill of Entry in respect of the goods was filed on 18th December, 1957 along with the licence and other papers for clearing the consignment. But the Customs Authorities raised objections on the ground that the said black insulating tape fell under the category of adhesive tape which could not be imported under the said converted licence. The Assistant Collector of Customs called upon the appellants to show cause why the goods should not be confiscated and penalty imposed, as the goods fell under the face value restrictions of which import was prohibited under the licence. The petitioners submitted their explanation on 30th January, 1958 and 7th February, 1958 pointing out that black insulating tape was given as an item different from adhesive tape in the Index and that was the view taken by the Customs Authorities when an enquiry was made in that behalf. The Assistant Collector sent up the papers to the Collector of Customs who passed the order sought to be quashed on 10th March, 1958. The following portions of the order are material :

"The explanation of the Importers is not satisfactory. Their claim that they had made an enquiry to the I. T.C. authorities and then imported the goods is not correct. It is seen that the enquiry had been made by M/s. Mahaveer Electric Corporation, Madras, and not by the Importers themselves. Further in the reply of Joint Chief Controller of Imports it had been clearly stated that the face value restriction would apply to Adhesive tapes and as the goods imported are adhesive tapes the restriction will apply to the importation. The importers' plea that previously they had cleared similar goods against similar type of licence produced under Bill of Entry Cash No. 1194 26th November, 1957 and that therefore they should be allowed to clear the goods now imported cannot be accepted as clearance allowed erroneous cannot be taken as a ground for allowing clearance of similar goods again. The precedent cited was apparently assessed under Item 73, I.C.T. as it was prior to the decisions taken subsequently to discontinue such erroneous assessment and fall in line with Bombay and Calcutta Customs Houses to assess such goods under item 82 (5), I.T.C. The goods were accordingly released without face value restrictions under section 38/II as they were not then considered to be adhesive tapes. Regarding importers' claim that the goods are assessable under Item 73 I.C.T. as per the clarification obtained from the Customs House, it is true that the Customs House had given such a clarification, but it does not affect the present case which pertains to the I.C.T. position. In the order-in-appeal ROR. No. 329 of 1955, dated 24th February, 1956 (copy produced by importers), the then Collector of Customs had set aside the orders of the Assistant Collector of Customs as the importation there had been made in accordance with a "long-established" practice in the Custom House. In deciding to fall in line with Bombay and Calcutta Custom Houses, it was held that the assessment made by this Custom House of black insulating tapes under item 73. I.C.T. were not an established practice but only a few erroneous assessments. As such the decision in this appeal does not also affect the issue in the case under adjudication. The goods

imported are adhesive tapes and are therefore restricted. The converted licence produced by the importers specifically excludes face value restricted items. The licence produced is hence not valid to cover the importation.

The importation is deemed to have been made in contravention of I.T.C. regulations."

He therefore directed the confisaction of the goods but gave the importers the option to clear the goods for home consumption on payment of a fine of Rs. 1,000 in lieu of confiscation.

It appears from the record that though the appellants themselves had not asked for clarification, other businessmen had asked for such clarification and this is admitted in the counter-affidavit filed by the Assistant Collector of Customs, Appraising Department. There is also an admission that the practice was to consider black insulating tape as separate from adhesive tape till about December, 1957 when there was a change in the practice. In the affidavit filed in support of their writ petition, it was alleged that both prior and subsequent to the impugned order of the Collector of Customs, black insulating tape had been allowed to be cleared under licences similar to the licence held by the appellants. By reason of the discrimination to the prejudice of the appellants, it was contended that Article 14 of the Constitution of India was contravened. The answer to this charge was :

"The instances of alleged discrimination given in paragraph 15 of the affidavit were cases in which importation was allowed on an erroneous classification. The consignments imported by Sha Pojaji Manormull and Sha Jheatmull Ghanmull cited in paragraph 15 of the petitioner's affidavit were released on warnings."

Before Rajagopalan, J., the validity of the order of the Collector was challenged on three grounds. (1) the classification of the goods by the Collector of Customs constituted an error of law apparent on the face of the record ; (2) the usage of the trade justified only the classification of the goods as "Black insulating tape" and not as "Adhesive tape" and, therefore the Collector had no jurisdiction to treat these goods as "Adhesive tape" and (3) the order of the Collector violated Article 14 of the Constitution because other importers were permitted to clear similar goods without payment of a fine. The learned Judge recognised that so far as the Madras Port was concerned, up to December , 1957, the goods of the variety imported by the petitioners were treated by the authorities as falling under the classification of Black insulating tape while they were classified as adhesive tape by the Customs Authorities in Bombay and Calcutta. It was only in December, 1957, that the Customs Authorities in Madras decided to fall in line with the Bombay and Calcutta Customs Authorities and to classify these goods as adhesive tape. The learned Ju dge refused to accept the first ground for the following reason:

"That the goods imported by the petitioner could be described as "Black insulating Tape" did not admit of any doubt. That they are adhesive in quality was not in issue either. The question therefore, arose, under which head should the goods be classified, adhesive tape or black insulating tapes ? I am unable to find anything either in Entry 38 or in the Index or anywhere else in the Policy Book to rule out the interpretation of the terms 'Black insulating tapes' to cover only black insulating tapes other than adhesive tapes. The entry "Adhesive tapes" in the Index has no reference to colour. Obviously, it has reference to insulation, because it is one of the sub-heads of Entry 38. There was therefore material, on which the Collector could come to the conclusion that the goods imported by the petitioner, which were insulating tapes, black in colour and also adhesive in quality, fell within the sub-head 'Adhesive tape'. As I said, on the material placed before me, I am unable to hold that it was a clear case of mis-classification when the Collector held that the goods fell within the sub-head 'Adhesive tape'."

The learned J udge held that the fact that up to December, 1957, the goods had been classified as black insulating tape did not affect the jurisdiction of the Collector to classify this consignment under a different head after December, 1957. As regards the charge of discrimination which amounted to a violation of Article 14 of the Constitution, the learned Judge observed thus :

"Though in March, 1958, itself two importers were dealt with in the matter of penalty, in a way different from the petitioner, that would not amount, in my opinion, to a violation of the fundamental right guaranteed by Article 14 of the Constitution. Even with reference to these two importers, that there was any classification other than what was applied to the petitioner was not alleged. It is only on the question of penalty for an apparent breach of the law, importing goods without a proper

licence that the charge of discrimination has been levelled that while two of them were administered warnings, a pecuniary fine was imposed on the petitioner. These were at least quasi-judicial proceedings. The imposition of a penalty, after a breach of the law has been established is a matter within the discretion of the authority which has jurisdiction to impose the punishment. An apparent difference in punishment is not enough to sustain a charge that Article 14 has been violated."

The learned Judge's order concludes as follows :

"It might be that the petitioner throughout acted in good faith, and that when he placed the order for the goods in question, he had the backing of the trade usage and the backing of the usage of the Customs Authorities at Madras that the goods were properly classifiable as Black insulating tape under the sub-heads enumerated in the Index to the Policy Book. But, while good faith might be a factor that could be taken into account in determining the quantum of the penalty to be imposed, that would not affect the proper classification of the goods, nor the question whether a contravention of section 167 (8) has been established. Obviously, in proceedings under Article 226 of the Constitution I am not concerned with the soundness or otherwise of the discretion exercised by the Customs Collector in levying a fine on the petitioner."

Mr. Gopalarathnam, learned counsel for the appellants, relied on the admitted practice which prevailed both with the businessmen and with the Customs Authorities of considering the kind of goods which were imported by the appellants as not falling within the class of "face value restricted goods." He relied on certain correspondence between other merchants and the Customs Authorities relating to the same class of goods, with special reference to the importance of correct classification emphasised in the Handbook of Rules and Procedure relating to Import Trade Control (1956). The following three paragraphs deal with this matter :

"Paragraph 4 : *Importance of correct classification.*—It is necessary for the intending importer to ascertain the correct classification of the goods he intends to import (with reference to the S. No. and Part of the I.T.C. Schedule) so that he may be able to apply to the proper licensing authority for a licence and to know exactly the licensing policy in respect of the item for which he is applying. For the sake of convenience, an exhaustive index of articles is attached to this book, and this will enable the importer to ascertain the correct I.T.C. classification of any particular item. An attempt has also been made to co-relate, as far as possible, the I.T.C. Schedule (except in Part VI) with the Indian Customs Tariff.

Paragraph 5.—The importance of ascertaining the correct classification of an article and entering it in the application for an import licence is too well known to be over emphasised. If an item is incorrectly classified by an importer, there is a possibility of its being delivered to the wrong licensing authority, or of being rejected. It is, therefore, in the interest of importers to make sure of the correct classification of the articles for which they are applying. In addition, an importer should give the fullest description of the articles applied for, so that any mistakes in classification can be corrected at the time of licensing. A further advantage of giving the full description is that when an item is correctly described in the import licence, even if the classification shown is incorrect, no difficulty will be experienced in the clearance of the goods on arrival.

Paragraph 6.—If an importer is in doubt as to the correct classification of a store, he may make a reference to the appropriate licensing authority, for clarification. In special circumstances, however, a reference in this behalf can also be made to the Chief Controller of Imports. When seeking the advice of the authorities concerned in regard to the classification of an item, the importer should, to enable the classifying authority to take a correct view of the matter, give the fullest description of the article and its detailed end-use. He should also send illustrative literature about the article and, wherever possible, samples thereof. If the tariff item under which these goods are assessed to duty by customs is known, it should also be indicated."

Undoubtedly the equity is entirely in favour of the appellants. Here was a merchant who imported goods under a licence which at the time when he placed the order was according to the trade usage and the Customs Authorities covered by such a licence. The goods arrived when such practice was still in vogue. It is only when the goods were sought to be cleared that there was a change in the practice so far as the Customs Authorities were concerned and the appellants found themselves faced with the objection which, if correct, would deprive them of their goods. It may be said that a clarification by the Customs Authorities based on a misconception cannot preclude the same authorities from changing their view and adopting the correct view. Logically this cannot be challenged. There can be nothing like a legal estoppel precluding the Customs Authorities from ever correcting a mistaken view. But this fact will have a bearing when we discuss later the question from a different aspect.

Mr. Gopalarathnam contended that even on the merits the order of the Collector was violated by an error apparent on its face. In the Index goods of

different description were included in the same Item 38 of Section II. "Adhesive tapes" and "Black insulating tapes" were enumerated separately. Mr. Gopalarathnam contended that these two categories must be exclusive. If there was a category of goods known in the market as "Black insulating tape", such category would not fall within the category of "adhesive tape", even assuming that the tape had an adhesive quality. The learned Government Pleader, on the other hand, contended that adhesive tape is a qualitative description and not a particular commercial article and any of the categories enumerated in the Index under Item 38 would fall within this class of adhesive tape if it had the adhesive quality. It is common ground that there is a category of goods known in the market as "Black insulating tape". *Prima facie*, therefore, without further clarification such kind of tape cannot be taken out of that category simply because it has an adhesive quality and may fall within the other class of adhesive tape. We do not know if there is in the market a class of tape called adhesive tape.

Learned Government Pleader argued that even assuming that the goods in question fell properly under both the categories, it was entirely a matter for the Customs Authorities to decide whether the goods fall within one or the other of the categories. For this position he relied on the decision of the Supreme Court in *Gulabdas & Co.* v. *Assistant Collector of Customs*[1]. That case related to the amount of duty payable in respect of certain imported articles. The importer claimed that the goods should be assessed to duty under Item 45 (*a*). The Customs Authorities assessed duty under Item 45 (4) of the Indian Customs Tariff. There was no question of the necessity of a licence in that case. The matter came up before the Supreme Court on application under Article 32 of the Constitution. Das, J., who delivered the judgment of the Court held that there was no violation of any fundamental right which will warrant the interference of the Supreme Court under Article 32 of the Constitution. Dealing with the question whether crayons should be treated as coloured pencils, his Lordship observed thus :

> "The contention that the impugned orders are manifestly erroneous, because 'crayons' have been treated as 'coloured pencils' is not a contention which can be gone into on an application under Article 32 of the Constitution. It has no bearing on the question of the enforcement of a fundamental right, nor can the question be decided without first determining what constitutes the distinction between a 'coloured pencil' and a 'crayon' a distinction which must require an investigation into disputed facts and materials. This was a matter for the Customs Authorities to decide and it is obvious that this Court cannot, on an application under Article 32 of the Constitution, embark on such an investigation."

We do not understand that in making these observations their Lordships were laying down a rule of general application that the High Court under Article 226 would not have the power to quash the order of the Collector made on a demonstrably absurd basis that a particular article fell within a particular class. Moreover, as we have already mentioned, the case before the Supreme Court dealt with only the imposition of duty. A passage similar to that which we have extracted above from the Handbook of Rules and Procedure was cited to their Lordships and they said :

> "We do not think that the aforesaid observations which relate to licensing policy have any bearing on the question at issue, namely, whether 'Lyra' brand crayons should be assessed under Item 45 (*a*) as stationery not otherwise specified or item 45 (4), as coloured pencils."

These observations are not without significance because if the matter related to licensing, the fact that there was clarification by the Authorities on the faith of which the merchant imported the goods might make a difference and might entitle the importer to relief.

It should not be overlooked that here we have the case of deprivation of property because confiscation is just that. It is idle to say that it is not, because on payment of a fine which is equal to the value of the goods, the importer can take delivery of the goods. It only means that the appellants having been deprived of their goods, are given an offer to purchase such goods. Keeping this in mind we shall refer to the penal provision under which the Collector of Customs

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1. (1957) S.C.J. 709.

purported to act. Section 167 of the Sea Customs Act mentioned the offences which shall be punishable to the extent mentioned in the third column of the same with reference to such offences. Item 8 of the Schedule in so far as it is material runs thus :

Offences.	*Section of this Act to which offence has reference.*	*Penalties.*
If any goods the importation or exportation of which is for the time being prohibited or restricted ......be imported or exported from India contrary to such prohibition.	18 and 19	Such goods shall be liable to confiscation. Any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.

The third column says that if an offence under Item 8 is committed, the goods concerned " shall be liable to confiscation ". The learned Government Pleader had to concede that the Customs Authorities have got the discretion either to confiscate or not in a particular case. In this very case reference has been made to two other cases in which in spite of an offence having been committed, the party in each case has been let off with a warning and without the goods being confiscated. The language does necessarily imply that there is a discretion because the language is not " such goods shall be confiscated." On the other hand the language is " *such goods shall be liable to confisaction* ". The Collector of Customs when acting under section 167 is obviously acting as a quasi-judicial tribunal, such discretion must be exercised judicially and not arbitrarily. The Collector must decide in each particular case if there were circumstances which would call for the drastic punishment of confiscation. If there was a case in which discretion should have been exercised in favour of the importer, this was such a case. The appellants had placed the order and the goods had arrived when admittedly the practice prevailing both with the merchants and with the Customs Authorities permitted goods of the category which the appellants imported under a licence such as the appellants held. The Collector does not appear to have dealt with the case as if he was vested with judicial discretion because he has not given any reason why the drastic punishment of confiscation should have been imposed on the appellants whereas two other similar merchants who had committed the same offence had been let off with a warning.

Therefore, on both the grounds, namely, that there was an error apparent on the face of the record, and that the Collector as a quasi-judicial tribunal had not exercised his discretion judicially, the order of the Collector should be quashed. We allow the appeal and the writ petition and quash the impugned order of the Collector, dated 10th March, 1958. No order as to costs.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

K. H. Chambers, Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 25 (4)—Succession to business—What constitutes.

No test of general nature can be laid down in order to determine what is 'succession' within the meaning of section 25 (4) of the Income-tax Act. Broadly speaking, however, in order to constitute succession there must be a taking over of the whole of the business concern and notwithstanding that minor assets of the business are omitted from the transfer that will not prevent there being a succession. If there is substantial identity or similarity in the nature and extent of the activities carried on by the two firms it would constitute succession.

Though in the instant case the successor firm did not carry on the business under the same name, factually however all the goodwill attendant upon the old business was transferred to the successor firm. The father, for the succeded company only separated an adequate portion of the assets for discharging the liabilities agreeing that the son should continue the firm. The successor continued without a break on the identical lines of business in the same premises with the same telephone number, post box number codes and trade marks and important sections of the staff that belonged to the company that was succeeded.

There was succession to the business and the assessee would be entitled to the benefits under section 25 (4).

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (2) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R.A. No. 819 of 1954-1955 on its file I.T.A. No. 2286 of 1954-1955, Assessment year 1948-1949 for decision on the following questions of law, *viz* :—

"Whether on the facts and in the circumstances of the case the Tribunal was right in law in refusing relief under section 25 (4) of the Indian Income-tax Act to the assessee ?"

K. R. Ramamani for *M. Subbaraya Ayyar, V. Seturaman, S. Padmanabhan* and *S. V. Subramanian*, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax and *S. Ranganathan*, for Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—In this reference, the question of relief under section 25 (4) of the Indian Income-tax Act arises in the following circumstances :

G. A. Chambers was carrying on a business in the export of hides and skins and mica in insurance and as a share broker. This proprietary business which was carried on under the name of Chambers and Company was, it is common ground, subject to assessments under the 1918 Act. In 1932 G.A. Chambers ceased to do that business and handed it over to his son K. H. Chambers. It is the case of the assessee K. H. Chambers, that there was a succession by him to this business attracting section 25 (4) of the Act, a contention which the Department declined to accept. This question of the succession to the business in 1932 arose for the first time in 1948-1949 when the business conducted by K. H. Chambers upto that date was taken over by a limited Company from the 1st of January, 1948. The Income-tax Officer accepted the position that G. A. Chambers was assessed under the Act of 1918. He further came to the conclusion that what took place in 1932 was that G. A. Chambers closed down his business and that K. H. Chambers commenced a fresh business which, though it dealt in the same lines as former business, was yet not a continuation of the business of Chambers and Company. He supported this conclusion by a reference to the division of assets and liabilities effected in 1932, which showed that a considerable portion of the liabilities and assets were retained by G. A. Chambers and that the trade name of Chambers & Company was not also taken over by the business conducted by K. H. Chambers. The conclusion reached by him was that the business started by K. H. Chambers in 1932 was not the same

* Case Referred No. 136 of 1956.

21st December, 1960.
(30th Agrahayana, 1882, Saka).

business carried on previously by G. A. Chambers, his father. That resulted in the finding that there was no identity between the two businesses, and that it could not, therefore, be claimed that the assessee's business was the one that had suffered tax under the 1918 Act.

Successive appeals carried to the Appellate Assistant Comissioner and the Appellate Tribunal failed. The Tribunal also held that :

"The identity of the son's business with that of the father was clearly lost on the 30th November, 1932, as the business as such on the foregoing facts cannot be said to have been transferred intact to the son, a large part of the assets and liabilities including some stock-in-trade having been retained by the father himself for eventual liquidation in pursuance of his intention to close down. In these circumstances, we have to hold that there has been no succession to the business by the son, as claimed, on the 30th November, 1932."

As directed by this Court, the following question was referred :

" Whether on the facts and in the circumstances of the case, the Tribunal was right in law in refusing relief under section 25 (4) of the Indian Income-tax Act to the assessee ?"

The correspondence that passed between G. A. Chambers and his son K. H. Chambers in 1932 and the further steps taken by them in relation to Chambers and Company have been marked as annexure to the statement of the case. On 7th July, 1932, G. A. Chambers wrote to his son thus :—

" As far as I can see at present, a general liquidation of C.C.'s affairs up to the end of August is very necessary in the meantime and if possible, before you leave on Monday, I think it would be advisable as a precautionary measure to give general notices to the staff of C. & Co., so that by the end of August we shall know the exact position and be free to stop or re-engage them. . . . . but as far as I can see at present, by the end of August, there is not likely to be much left of your Rs. 40,000 and it will need about Rs. 60,000 from me before C. & Co. has a clear slate and I simply cannot afford to risk any further sum under the same conditions, but I want you please to understand that in my opinion, even under present conditions the goodwill of C. & Co., is a decided asset. It is yours and I leave it to you, and I don't want to take it back again."

Thereafter G. A. Chambers suggested that K. H. Chambers should

" obtain some advantage from the goodwill and connections of Chambers & Co., either by interesting financially one or other of the firm's connections, or by offering to work on a commission basis, but it must be a clear commission basis, free of all risks and expenses."

To this letter, the son replied that he was trying to raise the necessary finance but wanted G. A. Chambers

" to pay to me or to my financier, when recovered, the proceeds of the debts now due, less the cost of recovery, less any losses on contracts in course of execution or in transit. . . . . If I get this finance, I would prefer to start right afresh in my own name or in the name of C. & Co., if you do not wish to trade under this name in future. I can get a place for less rent and use a smaller staff. I hope you will allow me to make use of existing private codes. . . . . ."

In December, 1932, G. A. Chambers addressed the auditors, Messrs. Fraser & Ross, and informed them that from the 1st of December, 1932, K. H. Chambers was running the export business separately in his own name, that the accounts of Messrs. Chambers and Company were to be closed up to the end of November, and that those accounts relating to G. A. Chambers were to be transferred to the account of Messrs. Chambers and Company in the books of the Chrome Leather Company. It may be mentioned here that G. A. Chambers was also the proprietor of the Chrome Leather Company, and that part of the accounts relating to G. A. Chambers in Chambers and Company which was sought to be transferred to the books of the Chrome Leather Company covered those assets and liabilities of Chambers & Co., which had been taken over by G. A. Chambers.

There was a division of the assets and liabilities between G. A. Chambers and K. H. Chambers on the 30th November, 1932. Broadly stated, a large volume of liabilities amounting to Rs. 5,95,433 was taken over by G. A. Chambers, with an equally large volume of assets to the value of Rs. 5,67,485. Of this, well over a sum of Rs. 5,00,000 was payable to the National Bank of India as against which the land and buildings of Chambers & Co., valued at a little over Rs. 4,00,000 were taken by G. A. Chambers. Annexure D-2 establishes however that liabilities to the extent of Rs. 27,266 were taken over by K. H. Chambers. K. H. Chambers also took over

the available stock-in-trade as part of the assets and over Rs. 40,000 worth of outstandings.

It is on these facts that the Department has taken the view that there was initially a discontinuance or closing down of the business of Chambers & Co., as run by G. A. Chambers and the commencement of an entirely new business by K. H. Chambers, and that the only reasonable conclusion to reach on these facts was to hold that K. H. Chambers did not succeed to the business in the same capacity as G. A. Chambers who carried on the business previously. The identity of the business was, in the opinion of the Department, destroyed, notably for the reason that the trade name of Chambers and Company was retained by the transferor G. A. Chambers.

It is certainly true that in the letter, dated 7th July, 1932, written by the father G. A. Chambers to his son, the father strongly advised the son that the business should be closed down. He pointed out that in view of the financial position then obtaining, it was not likely that very much would be left of them of Rs. 40,000 which had been invested in the company by the son, and that unless the father put in a further sum of Rs. 60,000, the business could hardly be said to have any financial stability. He proceeded, however, to suggest that if the son K. H. Chambers was insistent upon carrying on the business, he could yet obtain some advantage from the goodwill and the connections of Chambers and Company, but that it would be desirable to work on a purely commission basis free of all risks and expenses. Relevant portions of the son's reply have been extracted earlier which indicate very clearly that K. H. Chambers wanted to continue the business even if the name of the Chambers and Company was not to be associated with the trade in future. No doubt he mentioned that he would prefer "to start right afresh in my own name", and admittedly the business as conducted by K. H. Chambers was not conducted in the name of Chambers and Company. Nevertheless, it is conceded by the Department that K. H. Chambers continued to operate the same lines of business as were carried on by Chambers and Company taking over all the constituents of the business, using the same premises with the same telephone number, post box number, codes and trade marks and important sections of the staff that belonged to Chambers and Company. G. A. Chambers also utilised his good offices in getting the Liverpool and London and Globe Insurance Company to transfer the agency of that Company with Chambers and Company to the business thereafter to be conducted by K. H. Chambers. It is on these features that the assessee relies in seeking to establish that there was a real succession to the business within the meaning of section 25 (4) of the Indian Income-tax Act.

What is succession to a business is no doubt primarily a question of fact, but the inferences to be drawn from the facts and circumstances relating to an individual case do raise a question of law. If any one thing is clearer than another, it is that the decisions clearly point to the conclusion that no test of general nature can be laid down in order to determine what is succession. In Simon's 'Income-tax' (second edition), at page 137, it has been pointed out that no definition of 'succession' has ever been attempted and that:

> "as a result it has been necessary for the Courts to decide the matter in individual cases, and while some guidance can be obtained from the reported cases, the decisions of the Courts have frequently taken the form of holding that the question at issue was primarily one of fact and that there were no grounds for disturbing the decisions of the Commissioners on a point of law. In particular, argument from decided cases has resulted in the acquisition by the word 'succession' of a somewhat artificial meaning."

Broadly speaking, however, in order to constitute succession, there must be a taking over of the whole of the business concern, and notwithstanding that minor assets of the business are omitted from the transfer, that will not prevent there being a succession. In *Jittanram Nirmalram* v. *Commissioner of Income-tax, Bihar and Orissa*[1], the Patna High Court pointed out that it is not necessary that the successor business

1. (1952) 23 I.T.R. 288.

should have mathematically the same extent of business as the predecessor, but that it would suffice to consititute succession if there is substantial identity or similarity in the nature and extent of the activities carried on by the two firms. In that case, a firm which consisted of four partners stood dissolved as a result of a notice given by a partner. The remaining partners continued to do the same old business under the old firm name, the share in the profits and assets of the fourth partner being paid off partly in cash and partly by allotting to him a shop owned by the firm. The learned Judges referred to the decision of the Privy Council in *Commissioner of Income-tax, Bombay* v. *P. E. Polson*[1], where Lord Simonds had stated that the word 'discontinued' in section 25 (3) of the Act meant only a complete cessation of the business and did not include the case of discontinuance of the business by the person formerly carrying it on as the result of the transfer or assignment of that business to another person who thereafter carried it on. It would be seen from this decision that though a part of the business was left with the retiring partner and the successor took over only the remaining part of the business, it was nevertheless held to constitute a succession within the meaning of the Act.

The facts in *Commissioner of Income-tax, Burma* v. *Mansooklal Zaveri*[2], are to some extent similar ot the facts of this case. There a firm consisted of two partners ; it got into financial difficulties and was dissolved. More than three months after such dissolution, one of the partners executed a deed of release by which he surrendered his right to the stock-in-trade and furniture and to the use and occupation of the business premises. He also gave up all claims to the outstandings and assigned to the other partner the right to the trade marks of the firm. But before dissolution, certain major creditors were paid off. But apart from this, the assessee took over the assets and liabilities of the firm, carried on the same kind of business in the same premises though on a smaller scale. The name of the business was also slightly altered. On these facts, the Commissioner held that there was a succession within the meaning of the Act.

The learned counsel for the Department seeks to emphasise that G. A. Chambers had discontinued the business and that the assessee had commenced a fresh business, the identity between the two businesses having been destroyed in 1932. In putting forward this argument, reliance has been placed upon the correspondence between the father and the son to the effect, that the entire assets and liabilities were not taken over by K. H. Chambers and that the giving up of the firm-name of Chambers and Company for the succeeding business is a clear indication that the goodwill of the old concern was not transferred to K. H. Chambers. We have already indicated our view on the correspondence between the father and the son. We may once again say that though the father suggested to the son as strongly as he could that it would be better if the business were completely discontinued amounted to nothing more than paternal advice, the father himself conceding that the son had invested a fair amount of capital in the concern, and clearly left it to him to decide whether to continue the business. He, however, chose to retain the name of Chambers and Company but otherwise gave the son the full benefit of the goodwill of that concern by arranging for all the constituents of the old firm to be taken over by K. H. Chambers and by passing on all the advantages which the connections of the old firm had given it. It is also clear that the name Chambers and Company was retained by the father for the purpose of enabling him to take steps for discharging some of the heavier liabilities as against which he took over assets of about an equal value. The giving up of the name by itself is to our minds of no real significance, and if the fact that the successor firm did not carry on the business under the same name is sought to be construed as a non-transfer of the goodwill of the old firm, though legally it may amount to that, factually however all the goodwill attendant upon the old business was transferred to the successor firm. We have pointed out how in the *Rangoon case*[2], also there does not appear to have been a transfer of the goodwill in the sense that the same firm's name was continued by the successor firm.

1. I.L.R. (1945) Bom. 938 : A.I.R. 1945 P.C. 137 : (1945) 13 I.T.R. 384.

2. (1937) I.T.R. 664.

All the features that were found to obtain in the *Rangoon case*[1], are also found in the present case, such as that K. H. Chambers continued to carry on the identical lines of business in the same premises with the same telephone number, post box number, codes and trade marks and important sections of the staff that belonged to Chambers & Co. That was found as a matter of fact by the Tribunal in the statement of the case.

Learned counsel for the Department relies upon *Hariram Gopinath* v. *Commissioner of Income-tax, Punjab*[2]. That was a case where as a result of a dispute among certain partners who were running four businesses under a particular name, one partner locked up two of the shops. The other partners started two new firms in separate premises with new sets of account books. Subsequently, as a result of arbitration, the disputing partner was bought out and the remaining partners were enabled to realise the outstandings and discharge the liabilities of the old firm. But the significant feature in that case was that the right to carry on business under the trading name of the old firm was barred to all the partners. On reference, the learned Judges of the Lahore High Court took the view, that the new firm was entirely different from the old firm which was in fact discontinued and that there was no succession. It seems to us that on facts this case is clearly distinguishable from the facts of the present case.

Reference has been made by the learned counsel for the Department to two cases in *Wilson and Barlow* v. *Chibbett*[3], and *Ogston (H. M. Inspector of Taxes)* v. *Reynolds Sons & Co., Ltd.*[4]. In the first of these cases, a business had gone into voluntary liquidation and was advertised for sale. The assessee firm purchased the property, the stock-in-trade and the premises. Apparently, no book debts or liability to trade creditors or anything of the kind was taken over. The creditors were left to look to the liquidation of the company for realising what was due to them from the old company. The Commissioners held that there was no succession, a view that was upheld by Rowlatt, J., on the short ground that he could not discern any error in law. In the second of the above cases also, it was found as a question of fact that the assessee-company did not purchase a business formerly carried on but only certain of its assets. In that case, also, the old firm had been overtaken by bankruptcy and a trustee had been appointed. The trustee could only carry on the business with a view to winding-up. Though Rowlatt, J. held that the mere circumstance that the assets and the book debts and the liabilities were left to be worked off by the trustee in liquidating the concerns of the partners, did not conclude the matter, the Commissioners were justified in holding that the transferee-firm purchased only the assets of the old firm and started afresh. These cases to our minds deal with facts not comparable to those that obtain in the present case.

In *Industrial Development and Investments, Ltd.* v. *Commissioner of Excess Profits Tax, Bombay*[5], the learned Judges observed that the sale of goodwill would be a very important and material fact, because if goodwill was sold, it would support the contention that what was sold was a going business. Reliance has been placed upon this authority. That was also a case, however, where the business was sold by a receiver appointed by Court. The question really arose under section 8 (3) of the Excess Profits Tax Act (XV of 1940), the assessee in that case contending that there was no succession attracting tax liability under that Act. The learned Judges pointed out that what section 8 (3) of the Act does is to take away the fiction introduced by section 8 (1) of the Act, one of the purposes of that sub-section being a question of computation of depreciation. It would not to our minds be justifiable to apply any principle derivable from this decision except in the context of the very limited scope of the matter which the learned Judges had to consider in that case.

There are only two circumstances upon which the Department is enabled to rely in opposing the conclusion that there was a succession. They are firstly that the

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1. (1937) I.T.R. 664.
2. (1944) I.T.R. 367.
3. (1929) 14 Tax Cases 407.
4. (1929) 15 Tax Cases 501.
5. (1957) 31 I.T.R. 688.

major part of the assets and liabilities were retained by the transferor and that the firm's name was not transferred suggesting thereby that there was no transfer of the goodwill. It is not denied that there is otherwise a complete identity in the lines of business that were carried on by K. H. Chambers, that the same constituents were taken over and that the trade marks, codes, premises, etc., of the old firm were also enjoyed by the firm conducted by K. H. Chambers. If before the actual taking over by K. H. Chambers, those liabilities which were retained by G. A. Chambers had actually been discharged by using the assets that were reserved, there would certainly be no point in the objection. It seems to us that it makes very little difference in principle in the peculiar circumstances of this case, where the father and the son were jointly interested in the old firm even before November, 1932, that the father undertook this part of the settlement of the affairs of the old firm. The son was in charge of the business before November, 1932. It became exclusively his after November, 1932. The business was continued without a break. The non-user of the name of Chambers and Company has also to our minds not the effect of indicating that there was no transfer of the goodwill, because all advantages that would spring from the use of that name were in fact made available to K. H. Chambers. The suggestion that the business should be closed down that was earlier made by the father was most definitely not given effect to, the father, as it clearly appears from the subsequent conduct of the parties, agreeing that the same business should be carried on by the son, the son being relieved of the burden of discharging the liabilities by the good offices of the father, who separated an adequate portion of the assets for that purpose. In the light of all of these circumstances, the proper view to take is in our opinion that there was a succession to the business within the meaning of section 25 (4) of the Act.

In the result, we answer the question, in the negative and in favour of the assessee. The assessee will be entitled to costs. Counsel's fee Rs. 250.

V.S. ——— *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMAKRISHNAN.

Abraham J. P. Abraham .. *Appellant**

v.

Varampattan Asirbatham *alias* P. V. John and another .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 95—*Proceeding under—If can be treated as part of the suit—Proper procedure.*

An order under section 95 of the Civil Procedure Code (V of 1908) has to be passed as an order collateral to the decree or decision in the suit and it is appelable under section 104 of the Code. Such appeals are treated as appeals from orders and not appeals from decrees. Hence the Court cannot provide for grant of compensation under section 95 of the Code as part of the suit, and embody its decision while passing the decree in the suit. Since it is a collateral proceeding leading to an order independent of the decree in the suit a formal notice should be given to the aggrieved party, his objection heard and then an order passed. The matter does not appear to be merely one of form, but also of substance, because it was necessary to give an opportunity to the plaintiff to meet the claim for damages.

Appeal against the Decree of the District Court of Kanyakumari at Nagercoil in O.S. No. 174 of 1950.

J. S. Athanasius and *R. G. Rajan*, for Appellant.

S. Mohan Kumaramangalam, K. V. Sankaran, V. Ganapathisubramania Ayyar and *S. Mahadevan*, for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal against the judgment and decree of the learned District Judge of Kanyakumari in Original Suit No. 174 of 1950.

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*Appeal No. 336 of 1957. 23rd December, 1960. (2nd Pausa, 1882, Saka.)

The plaintiff and the first defendant were the owners of a rice mill known as the Janaki Mills, situated in Nagercoil town. The first defendant filed a suit against the plaintiff in Original Suit No. 994 of 1113 (M.E.) in the Nagercoil Munsif's Court, for dissolution of partnership and accounts and that suit was compromised on 9-5-1124 (M.E.). The second defendant an advocate, practising in Nagercoil, was appointed receiver during the pendency of the suit; and he was in possession of the above mentioned rice mill for a period of about six years until the plaintiff obtained possession through Court on 6-3-1125 (M.E.). The plaintiff alleged that during the period when the aforesaid receiver was in possession of the mill, various materials were found missing. The plaintiff also alleged that defendants 1 and 2 colluded together and removed the above materials with a view to obtain wrongful gain and cause wrongful loss to the plaintiff. The value of the parts thus found missing, was assessed at Rs. 4,592; and the plaintiff filed the suit against the first defendant and against the second defendant (advocate receiver) for a decree for the above sum of money as damages together with subsequent interest.

The first defendant alleged that as the plaintiff was unlawfully selling parts of the mill, he had applied for the appointment of a receiver for the mill. It was untrue that he colluded with the second defendant and removed any of the articles. The plaintiff without any cause of action against this defendant attached his moveables before judgment. Therefore, the plaintiff should pay damages to the first defendant.

The second defendant admitted his taking possession of the mill as receiver, in the prior suit in the Nagercoil District Munsif's Court. Until he obtained possession, the plaintiff was in possession. He did his best as receiver to see to the safe custody of the articles entrusted to him. On his motion, a watcher was appointed to look after the premises. Due to the apathy of the plaintiff, and the first defendant, there were thefts in the mill, and the second defendant made timely approach to the Court, and necessary action was taken therefor. It was alleged that, in any event, the value given to the missing articles was excessive.

The learned District Judge who tried the suit found that the plaintiff had no cause of action against the first defendant and no proper grounds for suing him. As regards the second defendant, the finding of the learned District Judge was that though there was loss of the articles from the mills due to theft, it had not been proved that such loss was caused by the wilful default or gross negligence of the receiver, second defendant. Therefore, the plaintiff could get no relief either against the first defendant or against the second defendant. The suit was dismissed. The learned District Judge also found that since the plaintiff had filed the suit against the first defendant, without any proper reason, and had also obtained an order of attachment of the first defendant's properties before judgment without proper reason, the plaintiff was liable to pay Rs. 100 as damages to the first defendant. In the result, the suit, as already stated, was dismissed with costs of the contesting defendants, and the plaintiff was also ordered to pay Rs. 100 by way of damages to the first defendant for attachment before judgment on insufficient grounds.

From the above decision the appeal is filed by the plaintiff. The plaintiff urged two contentions. The first was that the finding of the lower Court that there was no default or wilful negligence on the part of the receiver, second defendant, is incorrect and therefore, the plaintiff should be given relief by way of damages against the second defendant. It was next urged that the direction of the Court below ordering the plaintiff to pay damages to the first defendant was improper and should be set aside.

The points for determination in the appeal are:

(1) What were the articles missing from the mills during the time when the second defendant had possession of the mill as receiver, and what is their value?

(2) Is the second defendant responsible and liable to account for such loss?

(3) Is the order of the Court below directing the plaintiff to pay damages to the first defendant, justified and, if so, what is the quantum of damages to be awarded ?

(4) To what relief ?

Points 1 *and* 2.

The following dates are relevant. The second defendant was appointed receiver on 19-3-1119 (M.E.) which corresponds 5th November, 1943. The exact order appointing him as receiver has not been filed. He took possession as per his report, Exhibit C. on 16-4-1119 (M.E.) which would be about a month later, that is, approximately in December, 1943. No list of the articles found at the time he took possession was filed into Court. This is a very important circumstances for the purpose of making the receiver liable for loss of the missing articles. A Commissioner, one Padmanabha Ayyar, inspected the premises on 10th May, 1943 and prepared an inventory (Exhibit D) of the articles found at the premises. But, as pointed out by the learned District Judge, the plaintiff continued to be in possession of the mill till the time the receiver took possession. Unless, therefore, we have an inventory of the articles in the mill at the time, *i.e.*, at the time the second defendant took charge, it would not be proper to proceed on the basis that the articles noted in Exhibit D were exactly the articles of which the second defendant took possession, and which he is liable to account. The learned District Judge also has pointed out in paragraph 6 of the judgment, that the plaintiff himself had sold some of the parts of the mill, but his statement was that he had sold them before the report, Exhibit D was prepared, but anyhow the objection regarding the absence of an inventory at the time the receiver took charge still holds good.

It is not now in dispute that the mill was not in working condition, at the time the receiver took charge and no case has been urged by either party now before me that the receiver was expected to work the mill and account for the income.

Some time later, the receiver seems to have applied to the Court for appointment of a watcher, and on 10-11-1119 (M.E.), the Court called upon the plaintiff to state whether he was willing to pay for the expenses for appointing a watcher, or whether he was prepared to take possession of the mill on furnishing proper security. The plaintiff was prepared to take possession of the mill and deposited a sum of Rs. 200 and the Court ordered the receiver to hand over the mill to the plaintiff. The first defendant seems to have appealed to the High Court, and got this order set aside.

On 4-7-1120 (M.E.) the second defendant applied to the Court again for the appointment of a watcher. Apparently, there was a report about the theft of articles made by the receiver, because reference is found to an order of the Court at this time, that the receiver should complain to the police about the theft. On 4-8-1120 (M.E.), the plaintiff deposited the money for the expenses of a watcher. Again, on 24-10-1120 (M.E.) the receiver filed a petition in Court, stating that the watcher appointed, has reported to him that thieves had entered the rice mill on the previous night after removing the window bars and had stolen some articles and that the receiver had inspected the mill and found the complaint to be true. The Court ordered the report of the receiver to be forwarded to the Inspector of Police for necessary action and investigation. Presumably, in view of these thefts, the first defendant applied at this time to the Court for sale of the mill, but the plaintiff opposed it. On 21-1-1121 (M.E.) the watcher again reported that thefts continued to take place in the mill, that he was not willing to continue as watcher and that another watcher might be appointed. Apparently nothing was done by the Court on this application. The watcher seems to have continued to be at his post. On 8-4-1121 (M.E.) the watcher again reported about further thefts and the Court wrote to the police thereon.

The next information we have is the report of the receiver on 1-2-1122 (M.E.), (Exhibit V), stating that the building had become dilapidated, that the

roof might fall down any moment, that the watcher was not doing his duty properly, that he could not be found in spite of search, that a new watcher might be appointed, and that the second defendant might be relieved from his office as receiver. It was at this stage that the plaintiff moved for the appointment of a Commissioner to note the missing articles, and the Commissioner, a member of the Bar, by name Noor Muhammad, sent a report (Exhibit E 30-4-1122 (M.E.)) giving a list of the missing articles, with reference to the articles noted in the report (Exhibit D) of the previous Commissioner, Mr. Padmanabha Ayyar. A fresh attempt seems to have been made at this time to sell the mill on the motion of the first defendant, but the plaintiff objected. The plaintiff seems to have taken possession of the mill through Court on 6-3-1125 (M.E.).

The above summary of the events would show, first of all, that the second defendant had only the duty of keeping the mill in his possession and taking proper care of it. The second defendant appears to have thought that since he did not have to arrange for the working of the mill, but only to keep watch over it, the appointment of a watcher would have sufficed for the purpose. Accordingly, he moved the Court for the appointment of a watcher and a watcher was appointed. Thieves seem to have entered the mill and after some time part of the roof also fell down. The condition of the mill at this time was so bad that free egress and ingress could be obtained by strangers. But nobody seems to have cared to take steps to put an end to these happenings, by repair of the roof so as to make it difficult for the thieves to enter the mill again. But all this would require expenditure. The receiver could not bear this expenditure from his pocket. The parties would have to bear it. The fact that thefts had taken place was reported to the Court by the receiver. The Court should have given notice of this report to the parties. The parties should, thereafter, have moved for necessary directions for repair of the building so that future thefts could be prevented. It would have been probably more proper for the receiver to have moved the Court specifically for this purpose. He seems to have remained content with merely filing a report of the watcher regarding the condition of the mill and about its being left unprotected against thefts and so on. A perusal of the relevant report shows that there was a general apathy on the part of the parties to be vigilant in the matter of doing the necessary repairs to the mill premises even after thefts were reported by the receiver. Both the plaintiff and the first defendant are residents of the locality and the narrative of the happenings, shows that periodically one party was moving the Court for selling the mill and the other party was resisting it. This would indicate that both the parties were aware of the deteriorating condition of the mill, and the necessity to put an end to the deterioration by a sale of it. It is urged by the contesting respondents, that if the plaintiff had not objected to the sale of the mill, much of the loss noticed would have been avoided, or, as observed above, the plaintiff if he was not willing to have a sale, could have taken steps to repair the building or have the machinery removed to a safer building, but the plaintiff did not care to do so. In the above circumstances, it appears to me that the lower Court was right in its conclusion that the receiver could not be held guilty of wilful negligence in the matter of loss of materials, though, as observed above, it would have been more proper if he had asked for specific directions from the Court regarding repairs to the premises and the person who should bear the cost of the repairs, or removal of the machinery to a more safe and less exposed place. It is possible that the receiver thought that his duties ended with the appointment of a watcher and reporting thefts as and when they took place, leaving it to the parties to find funds and make arrangements for the repair of the premises. But, then, as observed above, the fact that the premises were in disrepair, and thefts were taking place as a consequence, was a circumstance which the parties could have been fully aware of, and it is their apathy that encouraged the recurrence of more and more thefts.

On the question whether the first defendant had colluded with the second defendant and brought about loss of the articles which was the allegation on which the plaint proceeded, the evidence is very vague and inconclusive. The plaintiff said that he heard about this from one Joseph, and Joseph in turn had information

from others. Neither Joseph has been examined nor the informants of Joseph been examined. As already observed, there is no evidence as to the exact condition of the mill and its accessories, when the receiver took charge and the inventory prepared by an advocate much prior to that date, cannot be used as the basis of comparison, for the purpose of noting the items of the missing articles, or their value.

I, therefore, confirm the finding of the Court below, that the plaintiff has not established his case of gross wilful default, or gross negligence, on the part of the receiver, on the basis of which his suit claim against the second defendant can succeed. He has also not established adequate grounds for obtaining relief against the first defendant.

As regards the quantum of the value of the missing articles, estimated by the District Judge, though the appellant had raised an objection about it in the grounds of appeal, it was not referred to in the course of the arguments before me.

I therefore find points (1) and (2) against the appellant.

As regards point (3), the learned District Judge has made the following observations at the end of paragraph 15 of his judgment :

"In my opinion plaintiff will have to pay damages to defendant 1 for the attachment before judgment, as the plaintiff had absolutely no proper reason to sue defendant 1 or to obtain an order of attachment before judgment. I would therefore award Rs. 100 as damages to defendant 1.

(16) In the result the suit is hereby dismissed with costs. Plaintiff will pay defendant 1 Rs. 100 by way of damages for the attachment before judgment."

This direction was objected to by the learned counsel for the appellant. He observed, in the first place, that attachment before judgment is obtained under Order 38, rule 5 of the Code of Civil Procedure. The provision for giving compensation is found in section 95. Section 95 contains two clauses : (*a*) where there has been an attachment before judgment, and it appears to the Court that the attachment (before judgment) was applied for on insufficient grounds ; or (*b*) when there has been an attachment before judgment and the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable grounds for instituting the same. In either of these cases the defendant may apply to the Court: and the Court may, on such application, award against the plaintiff, by its order, an amount not exceeding Rs. 1,000 as compensation to the defendant. It is also clear from section 104 (1) (*g*) of the Code, that an order under section 95, is appealable and that the appeal is an appeal against an order.

The gist of the above provisions would indicate that an order under section 95, has to be passed as an order collateral to the decree or decision in the suit ; and it is appealable under section 104, Civil Procedure Code. Such appeals are treated as appeals from orders and not appeals from decrees. No special provisions are made for the procedure to be followed in dealing with an application under section 95. But an application is necessary for the purpose but such application may form even part of a counter, but the Court has however to become seized of the matter before it could proceed (vide *Subraya* v. *Venkatarama*[1]). But it is clear from the above provisions that the Court cannot provide for grant of compensation under section 95, as part of the suit, and embody its decision while passing the decree in the suit. Since it is a collateral proceeding leading to an order independent of the decree in the suit, and from which an appeal as if from an order had been provided for in the Code it stands to reason, that after the Court has been seized of this application (whether by way of an independent application or by way of claim in a counter as pointed out in the above decision), a formal notice should be given to the aggrieved party, his objection heard, and then an order passed. But the learned District Judge has not adopted this course, but has treated the proceeding as part of the suit itself, and made the direction for payment of compensation, part of the decree in

1. A.I.R. 1917 Mad. 885.

the suit. It appears to me that this procedure is open to objection, because it does not appear to comply with the relevant provisions of the Code, which contemplate an independent enquiry followed by an order independent of the decree in the suit. The matter does not appear to be merely one of form, but also of substance, because it was necessary to give an opportunity to the plaintiff to meet the claim for damages, in a proceeding, which though it arises out of the suit, appears to be also independent of the suit. I therefore allow the claim of the plaintiff so far as it relates to the award of damages and direct that the order directing payment of damages be set aside.

In the result the appeal is allowed in part and the order of the Court below directing the award of damages to the first defendant is set aside. It is dismissed in other respects. The parties will pay and receive proportionate costs in this appeal.

K.L.B. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Anthony *alias* Bakthavasalu .. *Appellant* (*Accused.*) *

Madras Children Act (*IV of* 1920) *and Criminal Procedure Code* (*V of* 1898), *section* 29-*B—Offence punishable with death or imprisonment for life—Power of the juvenile Court to try—If section* 29-*B of Act V of* 1898 *takes away the power—Mode of trial under Act* (*IV of* 1920)—*If violates Article* 14 *of the Constitution—Penal Code* (*XLV of* 1860), *section* 376—*Offence of rape—Gist of.*

It was competent for the State Legislature to enact the provisions of the Madras Children Act (IV of 1920) and having regard to the juxtaposition of section 1 (2) and section 6, Criminal Procedure Code, section 29-B of the Code does not by any necessary implication take away the power of a juvenile court established by law to try a juvenile offender even for an offence punishable with death or imprisonment for life.

The mode of trial under the Madras Children Act does not offend Article 14 of the Constitution.

Under section 376 of the Penal Code, while there must be penetration in the technical sense, the slightest penetration would be sufficient and a completed act of sexual intercourse is not at all necessary.

The tender years of the child coupled with other circumstances *i.e.* absence of motive to falsely implicate the accused, its demeanour, unlikelihood of tutoring may render corroboration unnecessary but that is a question of fact in every case.

Lakhi Narayan Das v. *The Province of Bihar*, (1950) S.C.J. 32 : (1950) 1 M.L.J. 760 : 1949 F.C.R. 693, referred.

Appeal against the judgment of the Juvenile Court, Egmore, Madras in J.C. No. 122 of 1959.

K. Narayanaswami Mudaliar and *T. S. Ramaswami*, for the Appellant.

The Advocate-General (*V. K. Tiruvenkatachari*) and The Public Prosecutor *P. S. Kailsam*) on behalf of the State.

The Court delivered the following Judgments :

Anantanarayanan, J.—This is an appeal by the accused Anthony *alias* Bakthavasalu, a young boy aged about 15 years, who has been convicted under section 376, Indian Penal Code and directed to be detained in the Senior Certified School, Chingleput, for a period of three years, by a Court of Juveniles, Egmore, Madras. When this appeal was admitted, our learned brother Somasundaram, J. prepared a Memorandum pointing out that under rule 7 of the Rules framed under section 44 of the Madras Children Act, the procedure laid down in the Criminal Procedure Code (Act V of 1898) for the trial of summons cases has to be observed by the Juvenile Court in the trial of all cases, whether summons or warrant cases, but that this provision did not render it clear how precisely the Juvenile Court should proceed to try an offender for an offence exclusively triable by Court of

* Criminal Appeal No. 291 of 1959. 6th November, 1959.
(15th Kartika, 1881—Saka).

Session, such as the present offence under section 376, Indian Penal Code. The learned Judge observed that the procedure to be followed by the Juvenile Court in such a case was not clear, either from the provisions of the Madras Children Act, or from the Rules framed thereunder.

The matter has been now placed before us, along with certain additional grounds upon the same aspect urged by Mr. K. Narayanaswamy for the appellant.. Those grounds are, firstly, that the Juvenile Court was in error in exercising a jurisdiction at all in this case, because this is a contravention of section 29-B, Criminal Procedure Code ; secondly, that the Juvenile Court ought not to have followed the procedure laid down for the trial of summons cases, with regard to an offence exclusively triable by the Court of Session ; and, thirdly, that the mode of trial and the sentence itself under the Madras Children Act (Act IV of 1920), contravened Article 14 of the Constitution of India.

In view of the importance of these grounds, we have heard the learned Advocate-General and the learned Public Prosecutor upon these objections as well as the learned counsel for the appellant. We shall deal with this matter first, before proceeding into the merits of the conviction.

The ground of objection concerning the procedure to be followed, which is also the ground referred to in the Memorandum of Somasundaram, J. drawn up at the time of the admission of this Criminal Appeal, may be first disposed of. It has to be noted that, under section 4 (*v*), Criminal Procedure Code " 'summons case ' means a case relating to an offence, and not being a ' warrant case ' " and that under section 4 (*w*) " 'warrant case' means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding one year ". The result of this is that, as the learned Advocate-General contends, from the point of view of classification of cases for the purposes of the Criminal Procedure Code, every conceivable criminal case is either ' a summons case ' or a ' warrant case '. There is no third category. The further consequence is that all cases exclusively triable by the Court of Session are ' warrant cases ', as cases in which the offences are punishable with imprisonment for a term exceeding one year. Even an offence punishable under section 302, Indian Penal Code has thus to be technically classified as a warrant case. When we look at the scheme of the Code, we find that sections 241 to 250 (Chapter XX) relate to trial of summons cases by Magistrates. Sections 251 to 259 (Chapter XXI) relate to trial of warrant cases by Magistrates. Chapter XXII relates to summary trials. Chapter XXIII (sections 266 to 336) relates to trials before High Courts and Courts of Session. This part of the provisions of the Code concerns, according to the learned Advocate-General, a curial procedure, and not a third classification of cases. We accept this argument, which is in confirmity with the definitions we have set forth earlier, and the scheme of these chapters. Consequently, the procedure laid down in the Madras Children Act (Act IV of 1920) as applicable to all cases triable by a Juvenile Court, including offences exclusively triable by a Court of Session according to Schedule 2 of the Criminal Procedure Code, will be the procedure governing a case like the present also. As, under the Rules framed under section 44 of the Madras Children Act, that procedure is identical with the procedure to be adopted for the trial of summons cases, this case was properly tried by the Juvenile Court in conformity with those rules.

The more important question is whether the Juvenile Court could try such an offence at all, which is exclusively triable by the Court of Session according to Schedule 2 and the general scheme of the Code of Criminal Procedure. In this context, learned counsel for the appellant draws our attention to section 29-B of the Code of Criminal Procedure, which is in the following terms :

" Any offence, other than one punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate, or by any Magistrate specially empowered by the State Government to exercise the powers conferred by section 8, sub-section (1), of the Reformatory Schools Act, 1897, or, in any area in which the said Act has been

wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby ".

The argument of learned counsel (Mr. K. Narayanaswamy) is that section 29-B was enacted when the Reformatory Schools Act, 1897, was being replaced by other legislation such as the Madras Children Act or similar measures, or when such superseding laws were in contemplation. He states that, in consequence the Central Legislature laid it down that all such enactments shall operate only within this restricted scope, namely, that juvenile offenders may be tried by such special Courts or Magistrates for any offence " other than one punishable with death or imprisonment for life ". Those words have be to be read disjunctively, and the implication is that no Juvenile Court, nor Special Magistrate, can try a Juvenile for an offence punishable with imprisonment for life, such as an offence of rape. The Juvenile Court had, therefore, no jurisdiction in this case. Learned counsel also refers to a decision of a Bench of the Calcutta High Court in *Lakhi Sahu* v. *Emperor*[1], where with reference to an offence punishable under section 304 Indian Penal Code, it was held that section 29-B took away the jurisdiction of a specially empowered Magistrate to try a Juvenile offender.

The learned Advocate-General has addressed arguments upon this aspect, and drawn our attention, in particular, to section 1, sub-clause (2), Criminal Procedure Code, section 6, Criminal Procedurel Code and to the provisions of the Government of India Act, 1919 (9 and 10 Geo. 5) and the Schedules thereto, which originally governed the power of a State Legislature to enact a measure like the Madras Children Act (Act IV of 1920). It is important to note that under section 1 (2), Criminal Procedure Code nothing in the Criminal Procedure Code

> " shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force ".

Similarly under section 6, Criminal Procedure Code.

> " Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in India. . . . . ."

This juxtaposition of sections 1 (2) , Criminal Procedure Code and section 6, Criminal Procedure Code, taken along with the Government of India Act, 1919 and the Schedules thereto, clearly imply that the State Legislature had power to make a law for establishing Juvenile Courts to try all Juveniles, accused of any offence whatsoever. Hence, section 29-B does not take away the power of the State Legislature to enact a measure like the Madras Children Act (Act IV of 1920). The power of the Juvenile Court to try all Juvenile offenders for any offence, including murder, is therefore incontrovertible. The learned Advocate-General has sought to further sustain this argument upon the authority of *Lakhi Narayan Das* v. *The Province of Bihar.*[2] The learned Judges observed therein :—

> " The Concurrent List is not a forbidden field to the Provincial Legislature, and the mere fact that the Provincial Legislature has legislated on any matter in the Concurrent List is not enough to attract the mischief of section 107 of the Government of India Act. . . . . Section 1 (2) of the Criminal Procedure Code expressly lays down that the provisions of the Code would not affect any special form of procedure prescribed by any law for the time being in force ".

We accept the arguments of the learned Advocate-General that, upon the grounds set forth already, it was competent for the State Legislature to enact the provisons of the Madras Children Act (Act IV of 1920), and that, having regard to the juxtaposition of section 1 (2), Criminal Procedure Code and section 6, Criminal Procedure Code, section 29-B, Criminal Procedure Code does not, by any necessary implication, take away the power of a Juvenile Court established by law to try a juvenile offender even for an offence punishable with death or imprisonment for life.

The ground relating to Article 14 of the Constitution, might be immediately disposed of, as it seems to have very little substance. There is ample authority for

1. A.I.R. 1932 Cal. 487.
2. (1950) S.C.J. 32 : (1950) 1 M.L.J. 760 : (1949) F.C.R. 693 (708).

the view, which we need not reiterate and support by extensive citations of the case-law here, that in construing Article 14, a classification which rests upon reasonable ground of distinction must not be impugned as subversive of equality before the law. It is sufficient to refer to *Charanjitlal* v. *Union of India*[1], and *State of Bombay* v. *Balsara*[2]. The distinction here is for the benefit of the juvenile, and eminently reasonable, as the distinction enables a more informal procedure, and far more humane methods of punishing crimes committed by juvenile offenders. This ground must, therefore, be rejected.

We shall now proceed to the merits of the case.

The offence related to the rape, by the appellant, of a young girl Paulin (P.W. 1) aged about 7-1/2 years, and the daughter of Joseph (P.W.2), a butler by avocation. The girl (P.W.1) herself has given very clear and straightforward evidence, that the appellant raped her, and that she did not tell her mother then, as she was afraid that her mother would beat her. That night she had great pain, and her father (P.W.2.) took her out for easing herself at her request, and then noticed her abdomen and private parts, and questioned her, when the girl informed him of the offence. There has been some comment upon the delay in this case, but it is perfectly explicable and natural. The girl herself (P.W.1) did not speak to the facts till nightfall. Joseph (P.W.2) states that, as it was late in the night he took no action that night. The next afternoon he took P.W.1 to Nungambakam Police Station and preferred a complaint. When we bear in mind the considerable reluctance of parents in Indian Society, to complain about or even to divulge an act of defilement of a daughter of tender years, the delay can hardly be termed suspicious or unnatural.

The medical evidence shows that the girl (P.W.1) had lacerations over the edges of the hymen, which was also tender, though the membrane had not been ruptured. This is further in conformity with the examination of the accused by Dr. Chandrasekaran (P.W.3). Smegma was present in the organ of the accused, and P.W.3 states that this indicated that " the accused could not have had complete sexual connection ". There can be no doubt, therefore, that the incident of rape really occurred.

Learned counsel for the appellant has advanced an argument that the facts may not amount to the completed offence of rape, but only to an attempt at rape, and that the conviction under section 376, Indian Penal Code is therefore not sustainable. We have carefully considered the facts of evidence, and we are quite unable to agree. On the contrary, we are definitely of the view that the Bench of the Juvenile Court came to the correct conclusion here, even though it might superficially appear as if only an attempt at rape was involved upon the facts. The *Explanation* to section 376, Indian Penal Code is very clear. The authorities have uniformly laid it down that, while there must be penetration in the technical sense, the slightest penetration would be sufficient, and a completed act of sexual intercourse is not at all necessary. As observed in Gour's " The Penal Law of India ", 6th Edition (1955), Vol. II , page 1678 :—

" Even vulval penetration has been held to be sufficient for a conviction for rape ".

In the present case, there was certainly penetration, as the medical evidence shows, though it was slight.

The accused was properly convicted , and we consider that the direction for detention made by the Juvenile Court was the most appropriate sentence, under the circumstances of the case. Both the conviction and sentence are confirmed and this Criminal Appeal is dismissed.

We finally wish to express our indebtedness to the informed and lucid arguments of the learned Advocate-General lighting up the dim regions arising from recent amendments.

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1. (1951) S.C.J. 29 : 1950 S.C.R. 869 : A.I.R. 1951 S.C. 41.
2. (1951) S.C.J. : (1951) 2 M.L.J. 141 A.I.R. (1951) S.C. 318 (S.C.).

Ramaswami, J.—I entirely agree. I wish to add the following observations regarding four points pressed by the learned Advocate Mr. K. Narayanaswami Mudaliar. I have discussed them in detail in *Public Prosecutor* v. *Arumugam Pillai*[1].

(i) The depth of penetration is immaterial in so far as the offence under section 376, Indian Penal Code is concerned : *Ghanasyam Misra* v. *The State*[2]. Similarly, in the United Kingdom for rape to be constituted, there must be proof of penetration although very slight penetration is sufficient ; and the completion of the sexual act need not have occurred : Sexual Offences Act, 1956, section 44 ; *R.* v. *Cox*[3].

(ii) The learned advocate asked us to look for corroboration of the evidence of the victim, on the ground that rape has often been described as the easiest charge to make and the most difficult to refute : *Karichiappa Goundan* v. *Emperor*[4]. This question of corroboration has been the subject-matter of a decision of the Supreme Court in *Rameshwar Kalyan Singh* v. *State of Rajasthan*[5]. In that case the appellant was charged with committing rape on a young girl, eight years of age. The learned Session Judge held that the evidence was sufficient for moral conviction but fell short of legal proof because, in his opinion, the law requires corroboration of the story of the prosecutrix connecting the appellant with the crime. He was satisfied, however, that the girl had been raped by somebody. Accordingly he acquitted the accused. In the appeal by the State against acquittal the High Court held that the law requires corroboration in such cases but held that the girl's statement made to her mother was sufficient corroboration and setting aside the acquittal convicted the appellant. On appeal to the Supreme Court it was held : The first question is whether the law requires corroboration in these cases. The Evidence Act nowhere says so. A woman who has been raped is not an accomplice. If she was ravished, she is the victim of the outrage. In the case of a girl below the age of consent, her consent will not matter. The learned High Court Judges were wrong in thinking that they could not, as a matter of law, convict without corroboration. The tender years of the child, coupled with other circumstances appearing in the case, such as, for example, absence of motive to falsely implicate the accused, its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary ; but that is a question of fact in every case. In this case no corroboration beyond the statment of the child to her mother was necessary. The appeal was dismissed. How the principles laid down in the Supreme Court decision should be applied are set out in *Public Prosecutor* v. *Mohini Sankara Das*[6], and *State of Madhya Pradesh* v. *Sheodayal*[7], *Dulichand* v. *State.*[8] See also In re *Boya Chinnappa.*[9] How tell-tale signs on the person of the accused like smegma will also corroborate the prosecutrix; see : *Ramkala* v. *Emperor*[10], *Harendra Prasad* v. *Emperor*[11].

(iii) Thirdly, the learned advocate stressed the absence of any external marks showing resistance as negativing rape. The victim in this case was a girl of tender years and the assault was by a fully grown up boy. It will be fatuous to expect marks of resistance in such a case.

In fact even in the case of adults it has been held in *Rao Harnarain Singh* v. *State*[12], that a mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be " consent " as understood in law. Consent on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. Submission of her body

1. A.I.R. 1955 N.U.C. (Mad.) 4329.
2. A.I.R. 1957 Orissa 78.
3. (1832) 1 Lew 292.
4. A.I.R. 1942 Mad. 285.
5. (1952) S.C.J. 46 : (1952) 1 M.L.J. 440 : A.I.R. 1952 S.C. 54.
6. (1956) An.W.R. 572.
7. A.I.R. 1956 Nag. 8.
8. A.I.R. 1952 Ajmer 54 : 1952 Cr.L.J. 1575.
9. A.I.R. 1951 Mad. 760: (1951) 1 M.L.J. 110.
10. A.I.R. 1946 All. 191 : 47 Cr.L.J. 611.
11. A.I.R. 1940 Cal. 461.
12. A.I.R. 1958 Punj. 123.

under the influence of fear or terror is no consent. There is a difference between submission and consent. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of a girl, in order to relieve an act of criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing power and capacity to withdraw the assent according to one's will or pleasure. A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to ; it always is voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former. Our Courts have even gone to the extent that even consent after the first act of rape does not absolve the accused, as it might purely be the result of sexual urge and would not affect the first act of coitus which has already taken place aginst her will. Therefore, as pointed out by Dr. Kenny in his Outlines of Criminal Law, 17th Edition (1958), although the offence of rape is usually effected by violence, it has been decided that rape can be committed without the use of any violence, the essential point being that the woman's free conscious permission has not been obtained in the case of adults and in the case of girls below the age prescribed in the Sexual Offences Act, 1956 consent is no defence and resistance need not be looked for.

Finally I agree with my learned brother, that on account of the stigma which gets attached after the commission of the offence of rape and which would seriously jeopardise the chances of getting married in decent circumstances, the victims and their relatives are often thoroughly unwilling to come forward promptly with reports of the offences. In fact it requires a lot of probing and persuasion by the Police Officers for the affected parties to disclose the details of the commission of the offence. That is why in assessing the infirmities attached to delay in preferring a first information report due regard must be paid to the manners, customs and the mode of life of women and girls in this country which are very different, for instance, from those in England, and therefore a delay which may be considered sinister in England might get very legitimately explained in these parts. (Vide *Public Prosecutor* v. *Arumugham Pillai*[1].

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Ratnamala and another .. *Accused**

Suppression of Immoral Traffic in Women and Girls Act (*CIV of* 1956)—*Section* 2 (*a*) *and* (3)—" *Brothel* " —*Meaning of—Object of the Legislation.*

The object of the Suppression of Immoral Traffic in Women and Girls Act, 1956 is to prevent commercialised vice and not to penalise an individual prostitute. The idea is not to render prostitution *per se* a criminal offence.

The definition of "Brothel" in section 2 (*a*) of the Act implies that where a single woman practises prostitution for her own livelihood, without any other prostitute or other persons involved in the maintenance of such premises her residence will not amount to a brothel. An individual prostitute residing in a place cannot be said to be ' keeping a brothel ' so as to attract the penalty under the Act.

(Use of traps and mode of raid—Caution in procedure indicated).

Appeals against the Order of the III Presidency Magistrate of the Court of the Presidency Magistrates, Saidapet, Madras, in Case No. 6640 of the Calendar for 1959.

C. K. Venkatanarasimhan for *K. Ayyappan,* for Appellant.

The Public Prosecutor on behalf of the State.

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1. A.I.R. 1955 N.U.C. (Mad.) 4329.

* Criminal Appeal Nos. 207 and 322 of 1960. 11th January, 1961.
(21st Pausa, 1882, Saka).

The Court delivered the following

JUDGMENT :—These are related appeals from the judgment of the learned III Presidency Magistrate, Madras, in C.C. No. 6640 of 1959 on his file. The learned Magistrate convicted one B.S. Babu (accused 1) and his sister Ratnamala (accused 3) under section 3 (1) of the Suppression of Immoral Traffic in Women and Girls Act (Central Act CIV of 1956), and sentenced each to suffer rigorous imprisonment for one year and also to pay a fine of Rs. 10, in default to suffer rigorous imprisonment for one week.

Certain questions of considerable importance, both with regard to the implementation of certain provisions of this Act, and with regard to the entire technique adopted by the authorities in enforcing this piece of legislation, have arisen in these appeals. I propose to deal with them at some length, for they are certainly questions of importance to the citizen as well as the State. But, before doing so, I shall briefly set out the facts which the prosecution has claimed to have established by the evidence. I shall later advert to certain aspects of the testimony in greater detail, but a broad outline of the facts will be essential as an introduction to the questions actually argued before me.

The Assistant Commissioner of Police Vigilance (P.W.4) had information from an undisclosed source that the two appellants and their mother were keeping and maintaining a brothel in the upstair portion of No. 22, Poes Road, Teynampet. The landlady Gowri Ammal (P.W. 3) has been examined in the case, and she states that she lives in the ground floor with her family, and that the upstair portion has been divided into 3 tenements, one of which was occupied by the appellants. It is of some significance in this case that the daughter of P.W. 3 is a foster-child that she had another foster-child who was sent by the authorities to the Seva Sadan, Madras, and that P.W. 3 herself was fined Rs. 50 in a proceeding under the Suppression of Immoral Traffic Act. Having received this information, P.W. 4 made certain enquiries and verified its truth. Later, on the evening of 9th October, 1959, he arranged for a trap with one G. Radhakrishnan (P.W. 1) as a decoy, and it is here sufficient to state that P.W. 1 is a Nursing Orderly in the Indian Medical Hospital, who probably had prior contacts with the police. P.W. 4 also arranged with one Mani (P.W. 2) and a lady to accompany him as Mahazar witnesses. In the presence of these witnesses, P.W. 4 entrusted four currency notes of Rs. 10 denomination each to P.W. 1, after noting the numbers. In pursuance of the plan, P.W. 1 went with an informant to the upstair portion of the house where the brothel was being carried on. Here they met B.S. Babu (accused 1) and the mother, acquitted in the case. The informant talked with both these persons, and it was arranged that P.W. 1 should pay Rs. 40 and have sexual intercourse with Ratnamala (accused 3). P.W. 1 actually paid Rs. 40 to the mother (second accused in the case) and she gave it to accused 1, who put it in a trunk. There was a bedroom behind a *thatti* partition, and this was arranged for the purpose of prostitution. The informant took P.W. 1 to this portion, and left him there.

Ratnamala (accused 3) was in the bedroom, and P.W. 1 states that himsel and accused 3 then had sexual intercourse. Within a quarter hour or twenty minutes P.W. 4 (the Assistant Commissioner) came there along with Mani (P.W. 2), and the lady witness. P.W. 4 opened the *thatti* door, and saw P.W. 1 and Ratnamala (accused 3) lying together, in a state of almost total undress. Seeing the police party, the two got up and began arranging their clothes. Upon the demand of P.W. 4, the currency notes were taken out of the trunk by Babu (accused 1) and handed over. The numbers of these notes were verified with the numbers previously noted in a Mahazar (Exhibit P-1), and found to tally. The seizure list (Exhibit P-2) was prepared. The actual notes were marked during the trial as M.Os. 1 to 4. It is on the broad basis of these facts that both the present appellants have been convicted.

The Suppression of Immoral Traffic in Women and Girls Act (Central Act CIV of 1956), supersedes, as far as this State is concerned, the Madras Suppression

of Immoral Traffic Act V of 1930), the text of which differs from the Central Act in certain respects. The Central Act states, in its Preamble, that it was enacted to provide for the Suppression of Immoral Traffic in Women and Girls "in pursuance of the International Convention signed at New York on the 9th day of May, 1950." This feature was also noted and commented upon by a single Judge of the Bombay High Court (at Nagpur) in *State* v. *Gaya*[1], to which decision I shall have occasion to refer later. For our present purpose, it is sufficient to note, that, though the text of the Convention is unfortunately not available, it is clear enough that the purpose of the enactment was to inhibit or abolish commercialised vice, namely, the traffic in women and girls, for purposes of prostitution, as an organised means of living. The idea was not to render prostitution *per se* a criminal offence, or to punish a woman merely because she prostitutes herself. In *K.E. Adam* v. *State*[2], Ramaswami, J., has reviewed the available literature upon this subject, in an extensive manner. After making a historical survey, the learned Judge proceeded to observe that legislation, by itself, was almost powerless to eradicate this evil, and added " nor have all the social and administrative resources of modern civilization availed to exercise an effective control." I desire to emphasise that a careful scrutiny of the Central Act (CIV of 1956) clearly reveals that the Act was aimed at the suppression of commercialised vice, and not at the penalisation of the individual prostitute, or of prostitution in itself. This is of some importance in considering the case against the appellant Ratnamala (accused 3).

Section 3 (1) of Central Act (CIV of 1956) runs as follows :—

> " any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable. . . . . . ."

The learned Public Prosecutor has rightly emphasised that this wording is different from the text of the corresponding section 5 (1) in Madras Act (V of 1930), which was to the effect that

> " Any person who keeps or manages or acts or assists in the management of a brothel shall be punished. . . . . ."

The Central Act deliberately includes the words " or acts or assists in the keeping or management of", thus implying at least a fine shade of distinction between " keeping " and " management ". " Brothel " is defined under section 2 (*a*) as including

> " any house, room or place or any portion of any house, room or place, which is used for purposes of prostitution for the gain of another person or for the mutual gain of two or more prostitutes."

The last part of the definition is certainly significant. It implies that where a single woman practises prostitution for her own livelihood, without another prostitute, or some other person being involved in the maintenance of such premises, her residence will not amount to a " brothel". There cannot be any clearer indication of the purpose of the Act, which is to strike down commercialised vice, not to make the unfortunate prostitute, herself often a victim of economic pressures and social maladjustment, a criminal under the law. " Prostitute " is defined under section 2 (*e*) as :

> " a female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind."

The word " promiscuous " in this context clearly implies ' indiscriminate ', as the learned Magistrate has pointed out, following the unreported decisions of Somasundaram, J., in Crl. R.C. No. 231 of 1959 and C.A. No. 424 of 1959. Ramaswami, J., in C.A. No. 536 of 1959, earlier referred to, has cited with approval an observation by Beaumont, C.J., in an unreported case, to the effect that

> " prostitution involves a more or less indiscriminate employment of the woman's body for hire.....I do not say that it is a universal definition, and I do not suggest that a prostitute is bound to be entirely indiscriminate and to accept the first customer who offers her price like cabman on the rank. But I certainly think that prostitution involves more than intercourse with one man."

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1. A.I.R. 1960 Bom. 289.
2. C.A. No. 536 of 1959.

The point here is that, as the definition is framed, this plural and indiscriminate sexuality will be a matter of inference from the facts; it is certainly not necessary that the evidence of more than one customer of the prostitute should be adduced. We may now pass on to other sections of the Act, which reinforce the view that it is the suppression of commercialised vice which is aimed at, not the abolition of prostitutes and prostitution. For instance, section 4 lays down the punishment for persons living on the earnings of prostitution, other than the prostitute herself, and section 4 (2) raises certain presumptions, which are expressly made inapplicable to the case of a son or a daughter of a prostitute below the age of 18 years. Section 5 deals with the procuring or inducement, or the taking of woman or girls for prostitution, and section 6 similarly deals with the detention of a woman or girl in the brothel. Sections 7 and 8 are of particular significance. Section 7 makes punishable the practice of prostitution in or in the vicinity of certain public places, such as places of public religious worship, educational institutions, hospitals and nursing homes, etc. This is an illuminating provision, throwing light upon the intentions of the Legislature. This provision, undoubtedly, inhibits the woman herself from the practice of her profession in contravention of its terms, and, to that extent renders prostitution a penal offence. Similarly, section 8 deals with seduction or solicitation for prostitution by words, gestures or wilful exposure of person in a public place. Again, the intention is clear that it is the practice of prostitution in a particular manner, which offends social decencies, which is sought to be penalised. Section 14 renders offences under the Act cognizable, and section 15, which is particularly important in the present case, deals with the powers of the Special Police Officer to enter certain premises and make a search without a warrant. Under section 15 (1), the Special Police Officer must record his reasons for such urgent search, and, under section 15 (2) of the Act, he must be accompanied by two respectable inhabitants of the locality, one of whom at least must be a woman. The observations of Ramaswami, J. in C.A.No. 536 of 1959 already referred to, are here highly significant, though they do not refer to these provisions of the Central Act. The learned Judge said :

" A search warrant should be applied for. It is quite true that, in abnormal circumstances, in anticipation, a search may be made. But normally such a contingency would not arise because running a brothel, as just mentioned before, postulates a certain continuity...........The failure to take out search warrants would be viewed with a certain amount of care by the Magistrates, and the Magistrates must always find out and record in detail why such warrants were not obtained."

Before proceeding to the actual arguments addressed before me, I also desire to refer to *State* v. *Gaya*[1], previously cited. This was a trap case, with the use of a decoy witness, upon lines very similar to the present prosecution, if not almost identical. The conviction was under section 3 (1) of Central Act (CIV of 1956,) and the learned Judge made the following observations, which are highly pertinent: —

" The Act was passed in pursuance of the International Convention signed at New York for the suppression of immoral traffic in women and girls. It was never intended that the women or girls used for such traffic should be liable to punishment............To my mind, nothing can be more reprehensible than the conduct of this investigation. Under the very auspices of the officers charged with the duty of suppressing immoral traffic in women and girls, Sk. Kasam has sexual intercourse with Saru. Rather than suppress such traffic, the investigation encouraged it. If investigations under this Act are to proceed in this manner, in conceivable cases it will be difficult to determine whether a person was committing an offence under the Act or carrying on an investigation. Such investigations also will not have any salubrious effect upon the public mind and will not achieve the object for which the Act was passed."

Learned counsel for the appellants (Sri C. K. Venkatanarasimhan) advanced the following contentions. Firstly, he claims that, taking the facts as established, the conviction of Ratnamala (accused 3), the young girl who prostituted herself on the occasion in question, is quite illegal and opposed to the entire scheme of the Act. Secondly, he contends that, upon the established facts, it could not even be argued that the brother (accused 1) could be presumed to have assisted in the "keeping" or "management of" the brothel. It is strenuously contended that the few facts elicited in the examination of the witnesses are quite insufficient to warrant any such inference. The definition of " brothel " certainly implies more

1. A.I.R. 1960 Bom. 289.

continuity of maintenance of the premises, as Ramaswami, J., emphasised; even if the word "habitually", which occurs in section 4(*a*) of Madras Act (V of 1930), is not to be found in section 2 (*a*) of the Central Act, it is clear enough that the word " used " implies some continuity of maintenance, and not merely that the premises in question formed a setting for an individual or isolated act of prostitution. It is contended that, instead of adducing evidence of that kind, the prosecution in the present case has again adopted the technique, so frequently deprecated by Courts, of using a trap and a decoy like P.W. 1. Finally, the manner in which the raid was carried out has been the subject of adverse comment, as infringing the liberties of the individual; it is contended that even a prostitute has certain rights, and that the powers under section 15 (1) of the Act should not be utilised in such a manner as to involve a flagrant violation of those rights.

These arguments appear to me to be very important, and to merit careful consideration. I have considered them carefully, and I shall now proceed to state my conclusions, together with the grounds therefor.

I have no doubt that Ratnamala (accused 3) was wrongly convicted in this case, taking the facts as established. I think it is indisputable that the entire scheme of the Act is not such as to render the prostitute herself criminally liable, for the mere act of prostitution. It is noteworthy that the only exceptions are sections 7 and 8 already referred to, and neither section has been invoked with regard to the present facts. The learned Public Prosecutor concedes this, but points out that the word " keeping " occurring in section 3(1) of the Central Act, implies that even the prostitute, by her prostitution, may be assisting in the " keeping " of the brothel, if not in its management or maintenance. But I have no doubt that this was not the intention of the Legislature. Had that been so, nothing would have been easier than to make the prostitute strictly liable for any act of prostitution, carried on in premises which could be inferred to be a brothel. On the contrary, it is significant that " keeping," though distinct from " management ", has to be construed *ejusdem generis* with that latter word, and, in the " Law Lexicon " (Ramanatha Iyer, 1940) the verb " to keep " is said to include the sense of " to conduct or manage, to have the control and management of." There is absolutely nothing in the evidence which would justify the inference that accused 3(Ratnamala) was liable for this offence. The entire record merely establishes that she, an young girl of about 19, was either the victim of circumstances, or of her own predispositions, to the extent of wilfully prostituting herself upon the occasion for hire, with the decoy witness (P.W.1). There is absolutely nothing else against her. In my view, she is clearly entitled to acquittal, and her appeal must therefore be allowed. She is acquitted accordingly, and will be released forthwith. Her fine, if paid, will be refunded.

I now come to the case of the brother, accused 1. Here, upon a careful scrutiny of the evidence, I am convinced that, though the facts relate to this particular incident, in the main, they are such as to warrant the inference that this adult brother was rightly held to be liable under section 3(1). Learned counsel (Sri C. K. Venkatanarasimhan) points out that the informer has not been examined. It may be that, for several reasons, the prosecution deemed it inexpedient to do so, and likely to have untoward consequences upon the further implementation of the provisions of the Act. But Radhakrishnan (P.W. 1), the decoy witness, is very clear that the informant talked with both this appellant and the mother (accused 2), and arranged with them that P.W. 1 should have intercourse with Ratnamala, for hire of Rs. 40. In cross-examination, P.W. 1 admitted that he himself did not talk with this appellant (accused 1), but he was present when the contract was fixed up, as between the informer on the one hand, and accused 1 and the mother on the other. Again, when P.W. 1 paid the marked notes (Rs. 40) to accused 2, she handed over the notes to accused 1, who put the money in the trunk. Further, it is very clear from the evidence of Gouri Ammal (P.W. 3) that she herself was fined in a case under the Suppression of Immoral Traffic Act, and that one of her so-called foster-children had been taken away to Seva Sadan by the authorities. Admittedly,

the mother (accused 2) had returned from Bangalore only five of six days earlier, and this appellant (accused 1) was the adult male member, employed in Madras. P.W. 4 states that accused 1 opened the trunk, and produced M.Os. 1 to 4 from between two books in the trunk or box. The circumstances are such as to justify the inference (1) that the place was being used as a brothel, though the prosecution evidence is restricted to one incident of prosecution and (2) that accused 1 was assisting in the conduct of the brothel.

The appeal of this accused must therefore be dismissed, and his conviction and sentence, which is the minimum period of imprisonment for one year that could be imposed under the law, and a small fine, are confirmed.

I cannot part with this appeal without making certain observations upon another grave aspect, namely, the manner in which the entire raid was carried out by the Special Police Officer, and, in general terms, the technique that seems to be employed in these cases. So long as the civic consciousness of citizens is so low that the evidence of private persons who have visited such premises is not forthcoming, the use of a trap and of a decoy witness, however repeatedly deprecated by Courts, may be an inevitable evil. Nevertheless, it is vital to realise that the entire scheme behind the Act is not the proof of a single incident of prostitution, or of the activities of a prostitute. The Act closely follows the English Law upon the subject, and it is noteworthy that in Archbold's Criminal Pleading and Practice (1954 Edition), the form of indictment for keeping a bawdy-house under the Common Law (Chapter 18, page 1406) runs :

" and on other dates between that date and the date of ",

emphasising the continuity of maintenance of a house of ill-fame as the essential ingredient. It is unfortunate that certain constructive suggestions advanced by Ramaswami, J., in *K. E. Adam* v. *State*[1], appear to have been ignored. The learned Judge was aware that traps may be unavoidable, but he pointed out, after citing the observations of Lord Goddard in *Brannan* v. *Peek*[2], deprecating the resort to traps on the part of authorities, that evidence of a different character altogether could also be made available in such cases. Arragements could be made for maintaining direct observations on the premises, and evidence of such observations could be offered. The history of the tenancy, the particulars of the individual lodgers, the numbers of men visiting the premises, the hours of visits and the length of stay, could all be made relevant in a case of this character. I must further observe that, so long as the trap is mainly relied upon, it is open to the criticism that the authorities are thereby abetting the very evil, the discontinuance of which is the policy behind the Act.

I hope that, in future at least, even if traps are resorted to, this evidence may form but a part or segment of the evidence offered for prosecution ; other evidence of visits by different persons on different dates, and similar suspicious circumstances should also be adduced, to strengthen the impression or inference of the continuous use of the place as a brothel ; and that, finally, the powers of officers acting under section 15 (1) will be exercised with great care and caution. As observed by the Supreme Court in *State of Rajasthan* v. *Rehman*[3] where the law requires that reasons should be recorded in writing, a search made without such record is illegal. Again, the prosecution must always adduce the evidence of such record during the trial, and not merely leave it to the officer to state that the reasons were recorded.

In the present case, the record shows a further consideration of interest and significance, as it affects the rights of the individual. The learned Public Prosecutor does not dispute that even a prostitute is entitled to the protection of her person ; certainly, she is as much entitled to protection, as the most respectable women for instance, with regard to such offences as indecent assault or rape. Under section 509, Indian Penal Code, the intrusion upon the privacy of a woman with an intention to insult her modesty, is an offence. No doubt as the learned Public Prosecutor

1. C.A. No. 536 of 1959.
2. L.R. (1948) 1 K.B. 68.
3. (1960) S.C.J. 521 : (1960) M.L.J. (Crl.) 424 : (1960) 1 S.C.R. 991.

urges, in section 15 (6) of the Central Act (CIV of 1956), the Special Police Officer is exempted from liability in any civil or criminal proceeding, in respect of anything lawfully done for the purpose of the search. But I am quite unable to agree that this exemption could be utilised to conduct a search, in disregard of elementary decencies, even if they be decencies relating to a prostitute, in the manner disclosed, and most unfortunately disclosed, by the record in this case. Here, we have an instance of an officer, accompanied by witnesses, proceeding into the bedroom of an young girl and pushing open a closed door, without even the civility of a knock or other warning to her to prepare for the intrusion. Such conduct would be quite inexcusable, unless the officer thereby hopes to gather the evidence which is essential for proof of any charge. But, since prostitution is not an offence, I am really quite unable to see how the officer and party were justified in thus bursting into the bedroom of a girl and surprising P.W. 1 and the third accused together in a state of undress. There can be no doubt that such conduct implies an outrage on the modesty of the girl ; and I must reiterate that the modesty of a prostitute is entitled to equal protection, with that of any other woman. The technique of such raids must be totally altered ; otherwise, grave abuses of the law might enter into the very attempt to enforce the law. I put it to the learned Public Prosecutor whether the officer would similarly think himself justified, in proceeding into a bath-room, where an young girl suspected to be a prostitute was having a bath, in the hope of finding incriminating evidence ; the learned Public Prosecutor was compelled to concede that, as raids were conducted at present, such an incident could conceivably occur. The implemention of this Act will hence become an evil, unless it is not merely accompanied by tact and delicacy, but regard is also paid to the true spirit of the legislation, and the technique of implementation is revolutionised, giving a very subordinate part, if part need be given to it at all, to the unfortunate practice of designing traps and using decoy witnesses. I further direct that a copy of this judgment be forwarded to the authorities of the State Government for such action as they might deem fit to take in this matter.

R.M. ——— *Order accordingly.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *the Officiating Chief Justice,* MR. JUSTICE JAGADISAN AND MR. JUSTICE SRINIVASAN.

Muthuveeran Chetty .. *Petitioner**

v.

Govindan Chetty .. *Respondent.*

Promissory note—Allotment to one member at a partition of joint family property—No endorsement of transfer or deed of assignment—Suit on the note by the member—Maintainable.

Transfer of Property Act (IV of 1882), section 130—Partition in a joint Hindu family—Division is the consequence of operation of law—No transfer involved.

A member to whom a promissory note is allotted at a partition of the joint family properties, is entitled to sue on the note without an endorsement or deed of assignment in writing.

Where a division in status is brought into existence at a partition in a joint Hindu family, such division, though it may be initiated by the unilateral volition of a member of the joint family, nevertheless alters the character of the possession of the family properties by members thereof, a result which is undoubtedly a consequence of the operation of the rules governing the coparcenery under the Mitakshara School of Law. No transfer of property is involved thereby.

Where a change in the character of possession brought about by such means, whether or not it is followed up by an actual division of the properties by metes and bounds, such a change is the result of an operation of law and the interest acquired by the members of the family as a result of such partition, is brought about by operation of law and not otherwise.

Even apart from the statutory position that section 130 of the Transfer of Property Act does not apply to negotiable instruments, if the assignment of a promissory note at a partition to a member

* C. R. P. No. 798 of 1959. 9th March, 1961 (18th Phalguna, 1882, Saka).

does not amount to a transfer by act of parties but by operation of law, no document in writing in support of the assignment is required under section 130 of the Transfer of Property Act.

Where property gets transferred by operation of law, the special modes of transfer envisaged in the Negotiable Instruments Act are not required, and a person to whom the property in the negotiable instrument stand so transferred is entitled to sue on the note as such.

The Negotiable Instruments Act only deals with transfer by negotiation. Section 57 of the Act, by implication, seems to contemplate that the legal representatives of a deceased person can negotiate a promissory note. The practice of allowing the legal representatives in this country to sue on notes executed to their predecessors is apparently founded on the principle that the Act does not abrogate the rules of devolution of rights in the properties of the deceased. Inso far as the modes of transfer of negotiable instruments are concerned the Negotiable Instruments Act is not exhaustive and does not prevent the passing of property in the promissory note by operation of law.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Pudukottai, dated 11th December, 1958 and passed in S.C.S. No. 569 of 1958.

V. P. Raman, for Petitioner.

R. Rajagopala Ayyar, for Respondent.

This petition first came on for hearing before Balakrishna Ayyar, J., who made the following

ORDER.*—On 23rd June, 1937 the defendant executed a promissory note in favour of the plaintiff's grandfather for a sum of Rs. 70. The document provided for payment of interest at 12½ per cent. per annum. Subsequently the grandfather died and at a partition which took place between the plaintiff's father and his brothers, the promissory note was allotted to the plaintiff's father. But no endorsement was made on the note. On various dates in 1943, 1946, 1949, 1953 and 1956 the defendant made a payment of one rupee each and made appropriate endorsements on the promissory note. A brother of the plaintiff was given away in adoption on 26th October, 1958, with the result that the first plaintiff became solely entitled to all the rights under the note. In view of this the plaintiff's brother who had joined in the action as second plaintiff was struck off from the record. As the money due on the note was not paid, the plaintiff instituted the action, out of which the present revision petition arises, to recover the money due on the note.

The defendant filed two written statements. In the first he contended *inter alia* that the suit note had been executed in renewal of an earlier note and that he was entitled to the benefits of Madras Act IV of 1938. He next alleged that various payments had been made by his father and by himself which should be credited towards the principal of the debt under section 8 of Madras Act IV of 1938. He also contended that a payment of Rs. 37-8-0 had been made by the defendant's brother towards the promissory note and that this payment had not been given credit to by the plaintiff.

The defendant filed a supplemental written statement in which he pleaded

"The plaintiff cannot maintain the action on the promissory note executed in favour of the grandfather and obtained by the plaintiff's father in the partition between him and his brothers without an assignment in favour of the plaintiff's father. The plaintiffs cannot get any rights in the promissory note in their favour. The suit was hence to be dismissed *in limine*."

The point raised in the additional written statement of the defendant was tried as a preliminary issue and the learned District Munsiff recorded his finding in favour of the defendant. The plaintiff has therefore come to this Court in revision.

On this question divergent views have been expressed in this Court. In *Pattat Ambadi Marar* v. *Krishnan*[1], it was held that there could be no valid transfer of a promissory note payable to order otherwise than by endorsement and delivery. The

* 27th April, 1960.

1. (1887) I.L.R. 11 Mad. 290.

same view was taken in *Arunachala Reddy* v. *Subba Reddi*[1] where it was held that an assignee of a negotiable pronote cannot sue on the pronote as such unless it be endorsed to him ; and even assuming that he would be entitled to sue on the chose in action if the note had been assigned to him otherwise than by endorsement, he cannot do so unless the assignment be in writing as required by section 130 of the Transfer of Property Act.

The decision in *Muhammad Khumarali* v. *Ranga Rao*[2] proceeded on the basis that there can be a valid transfer of a promissory note otherwise than by endorsement. Bashyam Iyengar, J. observed at page 656,

" The important difference between *transfer by endorsment* and *transfer otherwise than by endorsement* of a negotiable instrument is that in the latter case the assignee will acquire in the bill or note as a chattel no more than the right, title and interest of his assignor, whereas in the former case the assignee by endorsement will have all the rights and advantages of a holder in due course of a negotiable instrument."

At page 657 of the report the decision in A.S. No. 175 of 1897 which ends as follows is reproduced :

" It is argued that, by the Negotiable Instruments Act, any other mode of transfer than by endorsement is excluded. We can see nothing in the Act to justify this contention."

The decision in *Chandana Venkatadri* v. *Lakshminarasimha*[3], follows the decision in *Muhammad Khumarali* v. *Ranga Rao*[2]. It was there held that a negotiable promissory note can be assigned otherwise than by endorsement and it is enough if the transfer is evidenced by a partition list. The decision in *Chandana Venkatadri* v. *Majati Lakshminarasimha Row*[3] is also along the same lines. That was a case in which a negotiable promissory note had been executed in favour of the third defendant as the manager of the family. At a partition that note fell to the share of the first plaintiff and his son. There was no endorsement on the note and it was therefore contended that the plaintiff could not sue on the note. That contention was overruled.

Efforts were made by counsel on each side to distinguish or explain away the decisions opposed to the line of reasoning he was adopting. But I do not think that the conflict between these decisions can be satisfactorily explained away. There appears to be a clear conflict of opinion, and I therefore direct that the papers be placed before the Hon'ble the Chief Justice so that if he agreed the following question may be considered by a Full Bench.

" Where at an oral partition among the members of a joint family a promissory note is allotted to one member of the family and no endorsement of transfer is made on the promissory note nor a deed of assignment executed in respect of the note, can the member to whom the promissory note has been allotted maintain an action on the promissory note as distinct from the debt."

Pursuant to the above reference, the case came on for hearing before a Full Bench. (*P. Rajagapalan, O.C.J., Jagadisan* and *Srinivasan, JJ.*).

V. P. Raman, for Petitioner.

R. Rajagopala Ayyar, for Respondent.

The Opinion of the Full Bench was pronounced by

*Srinivasan, J.**—The question raised in this reference to the Full Bench is whether a member of a joint family to whom a promissory note is allotted at an oral partition among the members of that family can maintain an action on the promissory note as distinct from the debt, in the absence of an endorsement of transfer made on the promissory note or of a deed of assignment executed in respect of that note.

This question arose in the revision filed by the plaintiff who was non-suited by the learned District Munsif of Pudukottai who upheld the contention of the defendant in the suit that the plaintiff obtained no rights in the promissory note without an assignment in his favour. The facts are that the defendant executed a promissory note for a sum of Rs. 70 in favour of the plaintiff's grandfather in 1937. The payee-grandfather died, and at a partition which took place between the sons of the payee, that is, the plaintiff's father and his brother the promissory

1. (1907) 17 M.L.J. 393.
2. (1901) I.L.R. 24 Mad. 654.
3. 1910 M.W.N. 824.

* 24th February, 1961.

note was allotted to the plaintiff's father. No endorsement was however made on the note. Subsequently, the defendant had been making various payments and appropriate endorsements of payment had been made on the pormissory note. On the death of the plaintiff's father, the right to this item of property survived to the plaintiff and his brother. The latter was given away in adoption so that the plaintiff became exclusively entitled to all the rights under the promissory note. Originally the plaintiff's brother had been joined in the action as second plaintiff but in view of his adoption, he was struck off the record. Apart from other contentions, whereunder the defendant sought to invoke the application of Madras Act IV of 1938, the further contention was advanced by the defendant, that in the absence of an assignment of the promissory note, the plaintiff was not entitled to any rights thereunder. It was this issue that was found in favour of the defendant, against which the revision was filed in this Court.

Balakrishna Ayyar, J., noticed the existence of divergent views on this question. He referred to one line of decisions wherein it has been held that there could be no valid transfer of a promissory note payable to order otherwise than by endorsement and delivery, and that an assignee of a negotiable promissory note cannot sue on the promissory note as such unless it is endorsed to him, and further that if the suit was on the chose in action on foot of an assignment otherwise than by endorsement such a transfer of the right could not be effected except by writing as required by section 130 of the Transfer of Property Act. In the other line of cases, the view found favour that there could be a valid transfer of a promissory note otherwise than by an endorsement, and that such a transfer did not stand excluded by any of the provisions of the Negotiable instruments Act. Certain decisions have taken the view that such an assignment otherwise than by an endorsement could be spelt out of a reference to the allotment in partition list. In view of this conflict of opinion, Balakrishna Ayyar, J., found it necessary to have the matter referred to the Full Bench.

It would be fairly obvious from the statement of the facts giving rise to this reference that the origin of the plaintiff's title to the promissory note is rested upon the incident of a partition in a joint family. The conflicting views presented before us in the course of the arguments were, on the one hand, that partition in a joint family does not amount to a transfer of the nature envisaged in the Transfer of Property Act, and that it is the result of an operation of law, notwithstanding that it may be initiated by an act of parties, that the Negotiable Instruments Act is not a comprehensive enactment in so far as the transfer of rights in negotiable instrument is concerned, and that such rights can get transferred by operation of law, in which event the special modes of transfer contemplated in that Act are not rendered necessary and on the other, that partition involves a transfer and in the case of a negotiable instrument must be effected either by the special modes specified in the Act or in accordance with section 130 of the Transfer of Property Act. The principal question for decision is thus which of these two views is correct.

The contention that an assignee of a negotiable promissory note cannot sue on the promissory note as such unless it be endorsed to him finds support in *Arunachala Reddi* v. *Subba Reddi*[1]. In that case, the plaintiff claimed that the note had been assaigned to him verbally at a partition. The managing member of the family in whose favour the note had been executed was also a party defendant in the suit and he denied the assignment. The learned Judges did not examine the question whether the allotment to a member of the family of a promissory note in favour of the managing member would suffice to transfer the property in that promissory note. They observed :

"Assuming that the plaintiff would be entitled to sue on the chose in action if the note were assigned to him otherwise than by endorsement, he could not, in our opinion when so suing, be regarded as suing on a negotiable instrument, and, therefore, would not come within the exceptions in section 137 of the Transfer of Property Act. Consequently, the assignment of the chose in action on which he relies is bad for want of writing under section 130 of the Transfer of Property Act."

1. (1907) 17 M.L.J. 393.

This decision however did not find favour in *Venkatadri* v. *Lakshminarasimha Rao*[1]. The view taken in *Arunachala Reddi* v. *Subba Reddi*[2], that the assignment of a negotiable promissory note could not be recognised unless there is an endorsement was expressly dissented from in this later decision. With particular reference to sections 130 and 137 of the Transfer of Property Act, the learned Judges observed :

" Section 130 of the Transfer of Property Act, however, does not, in our opinion, apply in view of section 137 of the Act which declares that section 130 among other sections does not apply to instruments which are for the time being,by law or custom, negotiable. At the time of the alleged transfer in this case, the promissory note was certainly negotiable. It was no doubt held in *Arunachala Reddi* v. *Subba Reddi*[2], that section 130 of the Transfer of Property Act applies when the cliam is made under an assignment and not by reason of an endorsement, the reason given being that when suing, the plaintiff cannot be regarded as suing on a negotiable instrument. Such a view would require the importation of words into section 137 of the Transfer of Property Act which are not to be found in it."

It may be mentioned that in both these decisions, an earlier decision in *Mohammad Kumar Ali* v. *Ranga Rao*[3] was relied upon which clearly laid down that though an endorsement on the note failed to be effective as such, it could yet be relied upon as an assignment, entitling the assignee to sue on the note.

The scope of the provisions of the Negotiable Instruments Act in so far as they deal with transfer of rights under a negotiable instrument was examined in *Muthar Sahib Marakair* v. *Kadir Sahib Marakair*[4]. In that case, the extreme contention was advanced that the provisions of the Negotiable Instruments Act did not permit any kind of transfer other than by endorsement, and that a Court trying an action on a promissory note was precluded from travelling beyond the four corners of the Act. The learned Judges repelled this contention and observed :

" The fact that the note is negotiable does not make any difference except that it carries with it certain peculiar incidents attached to it by the law merchant. The rules in regard to these choses in action prior to the Act do not cease to be any the less applicable to them by the passing of the Act unless its provisions expressly or impliedly affect these rules. If we now turn to the Act, so far as one can see, no provisions there constrain one to come to any conclusion. The only provision of the Act which could, with any plausibility, be relied on in support of the contention under consideration is the definition therein of the term ' holder ' and Mr. Krishnaswami Aiyer did lay stress on it. But the real import of this definition is that, to come within it, the party should be the owner *at law* of the negotiable instrument, *i.e.*, according to the law merchant, whatever such party's position and liability in equity may be. But this in no way interferes with the due application of rules which are unaffected by that law and which are not to be ignored simply because the Negotiable Instruments Act does not refer to them. The observation of Mr. Chalmers with reference to the English Bills of Exchange Act, 1882, may very well be applied to the Negotiable Instruments Act. He says at page 128 of his book on ' Bills of Exchange ' that the Act deals only with transfer by negotiation, that is, transfer according to the law merchant. It leaves untouched the rules of general law which regulate the transmission of bills by act of law and their transfer as choses in action or chattels according to the general law '........These, of course, are provisions inserted by way of caution only and do not mean that, but for them the rules of law referred to in those sections would have been unenforceable though there was nothing in the other provisions of the Act itself to forbid their application. And surely the absence of similar provisions in the Indian Act does not warrant the view that the Act abolished rules previously established even though they were in no way inconsistent with any of its provisions............It is thus clear that the absence of an endorsement to the plaintiff is no bar to the suit."

In *Ulagappa Chetty* v. *Ramanathan Chetty*[5], Coutts Trotter, J., noticed the conflict of authority but chose to rely upon *Arunachala Reddi* v. *Subba Reddi*[2] in holding that a person could not sue upon a promissory note which had not been endorsed to him. He observed :

" Apart from authority, I am very strongly of opinion myself that the case in *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*[6], cannot possibly be supported as it amounts *pro tanto* to a repeal of the Negotiable Instruments Act."

In the Bench decision *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*[6], from which Coutts Trotter, J., differed, the question arose whether promissory notes executed in favour of the Manager of the Court of Wards by the tenants of the estate taken possession of by the Court of Wards could after the termination of such management, be sued

1. (1910) 21 M.L.J. 80.
2. (1907) 17 M.L.J. 393.
3. (1901) I.L.R. 24 Mad. 654.
4. (1905) 15 M.L.J. 384 : I.L.R. 28 Mad. 544.
5. (1915) 3 L.W. 171.
6. (1908) I.L.R. 31 Mad. 534.

upon by the person entitled to possession of the property without there being any endorsement or assignment. In that case, the Court of Wards took over the property from the possession of the usufructuary mortgagee. During the term of management by the Court of Wards, the tenants executed promissory notes for the rents in favour of the Manager. On the death of the Zamindar the Court of Wards gave up its superintendence and replaced the plaintiff usufructuary mortgagee in possession and handed over the promissory notes to him. On suits laid on those promissory notes being dismissed, on the ground of the absence of an endorsement or an assignment, the matter came to the High Court in revision. One of the learned Judges observed :

"The promissory notes relating to the taluk were simply handed over to the plaintiffs' father, because, on the death of the ward, the power of the Court of Wards having ceased, there was no one who could legally endorse the notes.. The manager's powers, as such, had determined. When the plaintiff's father died property in the notes again descended to the plaintiff by operation of law. I am of opinion that the plaintiff is entitled to sue on the suit notes."

It was specifically held that property in a note may also pass by operation of law. The judgment of Coutts Trotter, J., wherein he differed from the decision of the Division Bench, was reversed in *Ramanathan Chetty* v. *Katha Velan*[1]. The following observations of the learned Judges are of considerable importance :—

"The possibility of transfer of right in the note by operation of law has not been the subject of judicial pronouncements to any considerable extent. In this Presidency, apart from certain observations of Miller, J., in *Sowcar Lodd Govinda Doss* v. *Muniappa Naidu*[2], the matter is *res integra*.

The Negotiable Instruments Act only deals with transfers by negotiation. Under the English Bills of Exchange Act, the common law of the land is expressly saved (see section 97). It is a pity that there is no such saving clause in the Indian Enactment. Section 57 of the Act, by implication, seems to contemplate that the legal representatives of a deceased person can negotiate a promissory note. The practice of allowing legal representatives in this country to sue on notes executed to their predecessors is apparently founded on the principle that the Act does not abrogate the rules of devolution of rights in the properties of the deceased.

If a son, as legal representative, can sue on a note executed to his father, there could be no impeniment in principle to other heirs or successors having a similar right. The case of trustee is, in some respects, stronger than that of other heirs. In the case of private trusts, section 75 of Act II of 1882 enacts that the property standing in the name of the predecessor shall vest in the successor. It is not necessary to obtain a transfer by an instrument or by endorsement. We fail to see why this principle should not be extended to public trusts."

After referring to Byles on Bills, the Judges proceed :

"The cases quoted by the author in supprort of the above propositions show that the English Bills of Exchange Act does not affect the common law right of devolution by operation of law. The same considerations are applicable to the construction of the Indian Enactment."

In *Gopala Pillai* v. *Kothandarama Aiyar*[3], the question was not specifically considered, but cërtain observations in that decision clearly establish that the legal representative of the deceased payee could maintain a suit on the promissory note as such, a view that can only be based on the proposition that the rights in the promissory note can devolve by operation of law. In that case, the payee died and the property in the promissory note was claimed by his brother and his widow. Ramesam, J., observed at page 851 :

"In the present case, no assignment is needed, for on the evidence....we must now assume that originally the suit note was executed for a debt due to the joint family but afterwards the brothers became divided in status and as a result the plaintiff and Natesa Aiyar's widow became each entitled to a half share.......The plaintiff was always the owner of a half share of the debt and required no assignment. The third defendånt inherits the other half share as the heir of Natesa Aiyar."

Though the ultimate decision therein proceeded on other grounds, the Court definitely held that the property in the promissory note can devolve upon the legal representatives of the deceased payee by operation of law and that the absence of any endorsement or assignment did not affect the claim of the persons suing.

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1. (1917) 33 M.L.J. 627 : I.L.R. 41 Mad. 353.
2. (1908) I.L.R. 31 Mad. 534.
3. (1934) 67 M.L.J. 843 . I.L.R. 57 Mad. 1082.

In *Kali Charan Prosad* v. *Muhammad Ibrahim*[1], the Calcutta High Court had to consider the case where a Receiver appointed in a partition suit sought to sue on certain promissory notes. The question arose whether the Receiver was not entitled to sue because his name did not appear on the body of the document as the original payee of the instrument. The learned Judges, in dealing with the question, observed :

" But the question is whether the Receiver could give a valid discharge. The reseems to be no reason why he could not. Analogy may be drawn from the case of death of the holder of a promissory note and it is conceded that in such a case his heir or executor or administrator could give a valid discharge and, therefore, would be entitled to sue. In other words,such a person could be the holder of the note. Section 57 prescribes how a note may be negotiated by the legal representative of a deceased person, but this is not the only method of passing title to a promissory note. It has been held in *Ramanatha Chetty* v. *Katha Velan*[2], that a promissory note executed in favour of a trustee can be sued on by his successor without endorsement or assignment, the Negotiable Instruments Act not affecting devolution of rights by operation of law. In *Surath Chandra Saha* v. *Narayan Chandra Chaudhuri*[3], it was held that a hand-note has two characters ; it is negotiable and it is also actionable and title may be transferred by the act of parties for example, by assignment, as also by the procedure prescribed in the Negotiable Instruments Act. In that case, the holder without endorsement sold his right, title, and interest in the hand-note to the plaintiff by a registered Kobala and it was held that the plaintiff was entitled to sue..........It seems to us, therefore, that the terms of section 8 of the Negotiable Instruments Act do not exclude the plaintiff as Receiver from being the holder of the promissory note and so he is entitled to bring the suit."

Viswanatha Sastri, J., summarised the position in the following words in *Veeramma* v. *Ammireddi*[4]. That was a case where a promissory note was taken in the name of the son on whose death the father a manager of the family gave discharge with reference to the son's widow. The widow sued to recover the debt due under the promissory note. The learned Judge observed :

" It has been held by our High Court that where the right to a debt evidenced by a promissory note vests by operation of law in a person different from the payee named in the note, as for instance, in a receiver in insolvency or a succeeding trustee, it is open to the persons in whom the right to the debt so vests to sue for the recovery even though they may not come strictly within the literal language of section 8 of the Negotiable Instruments Act, as ' Holders ' see the decisions in *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*[5] and *Ramanathan Chetti* v. *Kathan Velan*[2]. In the present case, the debt being a family debt the father of the deceased payee and the manager of the family, to whom the debt survived in its entirety, could realise it and give a valid discharge of the debtor."

Though this decision did not in specific terms deal with the question whether the father as the surviving member to whom the debt survived could institute an action on the promissory note as such, such a conclusion appears to be inherent in the above passage.

It seem to us to be unnecessary to labour the point further. It is clear that in so far as the modes of transfer of negotiable instruments are concerned, the Negotiable Instruments Act is not exhaustive and does not prevent the passing of property in the note by operation of law. In the cases we have referred to, the property in the notes descended from father to son by operation of law and the son was, held entitled to sue on the notes (See *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*[5], where *succeeding trustees were also held entitled* to sue on a promissory note executed in favour of a predecessor, though there was no endorsement or assignment. In *Ramanathan Chetty* v. *Kathan Velan*[2], a Receiver appointed by Court has been held entitled to sue, notwithstanding the absence of an endorsement or an assignment. In a recent decision of the Andhra Pradesh High Court in *Venkataswami* v. *Noor Muhammad*[6], Chandra Reddi, J., as he then was, sitting singly examined the several decisions and concluded that besides the two modes of transfer indicated in the Negotiable Instruments Act, there are two other methods, by opearation of law and transfer as a chose in action under section 130 of the Transfer of Property Act by which a person may become entitled to sue on the note.

1. (1937) 41 C.W.N. 697.
2. (1917) 33 M.L.J. 627 : I.L.R. 41 Mad.
3. (1934) I.L.R. 61 Cal. 425.
4. (1949) 1 M.L.J. 189.
5. (1908) I.L.R. 31 Mad. 534.
6. (1955) An W.R. 91 : A.I.R. 1956 An. 9.

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We accordingly reach the position that in proper cases it is not necessary for the person suing on the promissory note to rely only on an endorsement or such other mode as is provided for in the Negotiable Instruments Act, and that a suit by a person on whom the right devolves by operation of law cannot be defeated for absence of the endorsement. The further question that we have to examine is whether in the event of allotment of the property in the promissory note at a partition of the joint family, it can be regarded as a devolution of right by operation of law.

We have already indicated the conflicting contentions on this head. While one side claims that a partition does not amount to a transfer and that the division in status is by operation of law and not by an act of parties, the other side urges the opposite view. In *Radhakrishnayya* v. *Sarasamma*[1], the question arose whether a partition is a transfer within the meaning of section 53-A of the Transfer of Property Act and whether the doctrine of part performance could be invoked by a party claiming to be in possession by virtue of a partition under an unregistered deed. The question was extensively examined by the learned Judges. The cases which expressed themselves differently on this question were all considered, particularly in the light of the decision in *Atrabannessa Bibi* v. *Safatullah Mia*[2], on which both lines of decisions rested in coming to contrary conclusions. The learned Judges referred to Freeman on ' Co-tenancy and Partition ' and extracted the following passage ;

" Partition between coparceners neither amounts, to, nor requires, an actual conveyance. It is less than a grant. Its operation is not to pass the land by a fresh investure of the seisin, for parceners are supposed to be already in possession of the whole lands. Partition, therefore, makes no decree. It only adjusts the different rights of the parties to the possession; each does not take her allotment by *purchase* ; but is seized of it by descent from the common ancestor, as she was of her undivided share before partition,"

and after an exhaustive discussion of the case law, came to the conclusion :

" Partition, therefore, is really a process in and by which a joint enjoyment is transformed into an enjoyment in severalty. Each one of the sharers had an antecedent title and therefore no conveyance is involved in the process as a conferment of a new title is not necessary."

It is true that the opposing view was accepted by the learned Judges who decided *Rasa Goundan* v. *Arunachala Goundan*[3]. This case was however considered in *Radhakrishnayya* v. *Sarasamma*[1], and differed from.

Further weighty authority in support of this view that a partition is not merely the result of consensual act of parties but is really brought about by operation of law is found in the decision of the Privy Council in *Parbati* v. *Naunihal Singh*[4]. Their Lordships of the Privy Council observe, after referring to *Appovier* v. *Rama Subba Aiyan*,[5] and *Balkishan Das* v. *Ram Narain Sahu*[6].

"In both these cases, the members of a joint Hindu family, some of them being minors, acting by and through their parents, executed instruments in writing, providing in the first case that part and in the second case that the whole, of the joint family property should belong to and be enjoyed by the different members of the family in specified shares. The effect of this was held to be that as to the property so dealt with, there was a division of rights ; the status of the family was changed, the tenancy of the property served and converted from something, to use the language of English law, like a joint tenancy into a tenancy in common, and the previously undivided family became by operation of law divided."

The respondent however purports to rely upon certain observations of Lord Westbury in *Appovier* v. *Rama Subba Aiyan*[5] in support of his contention that a partition is not the result of an operation of law. We are unable to read any such clear expression of view in these observations. On the other hand, a distinction is drawn between a division of status and a division of the property itself by metes and bounds. In dealing with the contention that a deed agreeing to a division is ineffectual to convert the undivided property into divided property, unless it had been completed by an actual partition by metes and bounds, Lord Westbury observed at pages 80 and 90 :

1. (1950) 2 M.L.J. 338.
2. (1915) I.L.R. 43 Cal. 504.
3. (1923) 44 M.L.J. 513.
4. (1900) L.R. 36 I.A. 71 : I.L.R. 31 All. 412 (P.C.).
5. (1866) 11 Moore's Ind. App. 75.
6. (1903) L.R. 30 I.A. 139 : I.L.R. 30 Cal. 738 (P.C.).

"Their Lordships do not mind that any such doctrine has been established ; and the argument appears to their Lordships to proceed upon error in confounding the division of the subject, to which the title is applied." . . . But when the members of an undivid"d family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain shares, which he may claim the right to receive and to enjoy in severalty although the property itself has not been actually severed and divided.

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It is necessary to bear in mind the twofold application of the word ' division '. There may be a division of right, and there may be a division of property; and thus, after the execution of this instrument, there was a division of right in the whole property, although, in some portions, that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition."

We have referred earlier to *Atrabannessa Bibi* v. *Safatullah Mia*[1], which forms the starting point of the two lines of decisions, one holding that a partition amounts to transfer of property and the other taking the contrary view. In that decision, the question that arose was whether a benamidar could maintain a suit for partition of joint immoveable property. There the plaintiff took a conveyance in respect of an undivided share of joint family property and instituted a suit for partition and joined her vendor as *pro forma* defendant. The defence was that the conveyance was a fictitious transaction and that the plaintiff being only a nominal owner was not entitled to maintain the suit. This contention found favour with the trial Court and the suit was dismissed. The learned Judges in dealing with the question referred to the distinction between suits for lands and suits for money claims and to the line of cases which denied the right of the benamidar to maintain a suit for land. According to the learned Judges, the substantial question that arose before them was whether a suit for partition fell within the class of the suits for land, or within the class of suits for money; they observe :

" In our opinion, a suit for partition of immovable property should, for our present purpose, be included in the same category as a suit for possession of lands. The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners; or, as has sometimes been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. Partition is thus the division made between several persons, of joint land which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him ; the essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property."

While one line of cases which held partition not to be a transfer rested its conclusion on one part of the above extract, the cases which held to the contrary relied upon the statement that the partition amounted to a surrender and exchange It seems to us that the principle derivable from the above passage is certainly not different in content from that laid down in the two Privy Council decisions to which we have made reference.

Venkataramana Rao, J., in *Sankaralingam Pillai* v. *Veluchami Pillai*[2], in dealing with the rights of the adopted son to set aside an earlier partition observed :

"Mr. Rajah Iyer contends that the partition must be put on the same footing as a valid alienation, but I am not able to agree with his contention. Partition may no doubt in a sense be transfer but it is in substance an adjustment of the ownership of many persons in the joint family property by assigning particular portions of it to a sveral ownership. It cannot strictly be called an alienation of join family property."

To our minds, these observations do not lend any support to the contention of the respondent that a partition amounts to a transfer.

This question in a slightly different form came up for consideration in a Bench decisions of this Court in R.C. No. 49 of 1956. There, a father, the Kartha of joint family, purported to pool his self-acquired properties with the ancestral joint family property for subsequent division among the members of the coparcenary.

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1. (1915) I.L.R. 43 Cal. 504. 2. (1942) 1 M.L.J. 119.

The question arose whether there was a transfer of assets within the meaning of section 16 (3) (*a*) (iv) of the Indian Income-tax Act. It was observed :

" Where the self-acquired properties of a coparcener—in this case the coparcener was the father of the other coparceners and the kartha of the coparcenary—are pooled with joint family property, and partitioned, there are three distinct stages. First the self-acquired property of the coparcener is impressed with the character of the joint family property of the coparcenary. The next stage is the disruption of the coparcenary. The members thereafter become divided in status. The next stage after that is the actual division between the divided members of what had been the property of the joint family. Each of these stages may be separated from the succeeding one by an interval of time, considerable or otherwise. The length of the interval however does not affect the principle in deciding the question, was there a transfer of property at any stage. Obviously no question of transfer of assets can arise when all that happens is separation in status, though the result of such severance in status is that the property hitherto held by the coparcenary is held thereafter by the separated members as tenants-in-common. Subsequent partition between the divided members of the family does not amount either to transfer of assets from that body of the tenants-in-common to each of such tenants-in-common.......... Severance in status with the resulting change in the nature of the ownership of the property is one of the incidents of a coparcenary. The property held by the coparcenary vests in the separated members as tenants-in-common after the severance in status. That result can be brought about by the unilateral exercise of the violition of the separating member or members of the family. At that point of time, the property, which had up to then been impressed with the character of joint family or coparcenary property, becomes impressed with the character of property held in severalty by the tenants-in-common............

* * * * *

" Coparcenery property ceasing to be joint family property of the coparceners on a division in status between them and becoming thereafter the property held in severalty by the divided members, and the property of a coparcener ceasing to be his and becoming the property of the coparcenary of which he continues to be a member are both incidents of a coparcenary governed by the Mitakshara School. Either can be brought about by the unilateral action of the coparcener concerned. Neither transaction amounts to a transfer of property from one juristic entity to another. A transfer is essentially a contract, a bilateral transaction. The transaction by which a property ceases to be the property of a coparcener and becomes impressed with the character of coparcenary property does not itself amount to a transfer. No transfer need precede the change. No transfer ensues either. "

It should thus follow that where a division in status is brought into existence at a partition, such division, though it may be initiated by the unilateral volition of a member of the joint family, nevertheless alters the character of the possession of the family properties by members thereof, a result which is undoubtedly a consequence of the operation of the rules governing the coparcenary under the Mitakshara School of law. No transfer of property is involved thereby. The conclusion seems to us to be irresistible, that where a change in the character of possession brought about by such means, whether or not it is followed up by an actual division of the properties in metes and bounds, such a change is the result of an operation of law, and the interest acquired by the members of the family as a result of such a partition is brought about by operation of law and not otherwise.

Amir Bibi v. *Arokiam*[1] dealt with the case of an oral award under which a hypothecation bond was allotted to the holder. The maintainability of the suit by the person to whom the hypothecation bond was allotted was attacked on the ground that even if the award was true, it was not followed up by the execution of a conveyance. The learned Judges took it to be settled law that an award may be oral and that an oral award is as binding on the parties as a written award. They further proceeded to hold on the basis of earlier decisions that partitions were enforceable even in the absence of any writing or registration to evidence such a partition and that oral dedications of property to an idol were also valid and that

" the Transfer of Property Act is not exhaustive of all modes of transfer and if there is a transfer of property which would not come within the special modes discussed in the Transfer of Property Act, the conditions as to writing and registration prescribed by the Act have no application. The mode of transfer by an award is not dealt with by the Transfer of Property Act. Consequently, the decision of the arbitrators by which they are said to have given the mortgage bond to the present plaintiff is enforceable between the parties, if there is an oral award. In this view also, plaintiff would acquire a title to sue upon the hypothecation bond."

This decision would certainly support the conclusion that title could pass on foot of an oral award untrammelled by any of the requirements of the Transfer of

1. (1917) 45 Ind. Cases 813.

Property Act, that is to say, the transfer must necessarily be by operation of law. The case of an oral partition can in no wise be different. A case almost directly in point was decided by Pandrang Row, J., in *Subbarayadu* v. *Subbarayadu*[1]. There as a result of an award, the suit promissory note was allotted to the plaintiff and actually delivered to him. The question arose whether the suit was maintainable in the absence of an assignment. The learned Judge said :

"The award which is relied upon by the plaintiff operated in any opinion as a transfer *inter alia* of the suit promissory note from defendant 2, the payee mentioned therein to the plaintiff. . . . . There can be no doubt that the effect of the award, which allotted the suit promissory note among other things to the share of the plaintiff, was to transfer the property in the suit promissory note to the plaintiff, and the plaintiff is therefore entitled as the owner to maintain the sjuit on the promissory note."

The learned Judge in coming to this conclusion did not consider it necessary to refer to any cases other than the one referred to earlier *Amir Bibi* v. *Arokiam*[2], which dealt with the effect of an award.

Though not directly in point, there is a decision of our High Court in *Santhamma* v. *Neelamma*[3], where in dealing with the constitutionality of the Madras Aliyasanthana Act of 1949, the learned Judges had to determine the nature of a partition. After dealing with certain decisions the learned Judges held :

"This decision and the passage extracted above show that the expression 'inheritance' or 'succession' as used in the Regulations and the other Parliamentary and Indian Enactments is not to be understood as confined to cases of a 'Devolution' in the strict sense of a passing of interest of property from the dead to the living but as comprehending also the adiustment of the rights and obligations that subsist between the parties governed by Hindu Law.

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"We might add that we do not also see any sufficient reason why in framing these Lists the Parliament should have thought fit to take away the law relating to partition in joint families from the jurisdiction of the Indian Legislatures. We, therefore, consider this argument. . . regarding the wide import of the expressions 'devolution' and 'succession' and as to the words being apt to cover partition in a Hindu family, well founded."

In the view expressed in these decisions, it follows that the law as laid down in *Kasa Goundan* v. *Arunachala Goundan*[4], *viz.*, that a partition among members of a joint Hindu family is a transfer to which the provisions of section 53 of the Transfer of Property Act will be applicable, is no longer good law.

The last case to which we need refer is the decision of the Bombay High Court in *Virappa* v. *Mahadevappa*[5]. In that case, also, a promissory note which was originally executed in favour of the son was allotted to the father on an arbitrator's award and a decree which followed it. When the father sued upon the note making his son a defendant, it was held that the facts did not amount to an assignment by operation of law. While the learned Judges conceded the position that there are three possible kinds of transfer conceivable, *viz.*, by endorsement, by assignment as a choose in action and by operation of law, on the facts they appear to have held that the suit could not be maintained. They observe :—

"The appellant cannot succeed on record, for the promissory note has not been encorsed in his favour, and it is not mentioned as going to his share in the award, and all there is to infer from that he is the beneficiary, is the acquiescence of his son, the payee, in the plaint, which clearly is not enough on any wiew of the law on the point."

Considering the narrow ground on which the ultimate decision in this case was rested, it is not possible for us to accept this decision as an authority for the position that the transfer of the interest in the promissory note following an award at a partition cannot amount to a transfer by operation of law, the more so in the light of other cases more directly in point to which we have earlier made reference.

It accordingly follows that a partition in a joint Hindu family does not operate as transfer within the meaning of the Transfer of Property Act. Even apart from

1. A.I.R. 1935 Mad. 473.
2. (1917) 45 Ind. Cases 813.
3. I.L.R. (1956) Mad. 785 : 1956 Mad. 642.
4. (1923) 44 M.L.J. 513.
5. A.I.R. 1934 Bom. 351.

the statutory position that section 130 of the Transfer of Property Act does not apply to negotiable instruments, if the assignment of a promissory note at a partition to a member of a joint family does not amount to a transfer by act of parties but by operation of law, no document in writing in support of the assignment is required under section 130 of the Transfer of Property Act. Where property in a promissory note gets transferred by operation of law, the special modes of transfer envisaged in the Negotiable Instruments Act are not required, and a person to whom the property in the negotiable instruments stand so transferred is entitled to sue on the note as such.

The reference is answered accordingly.

Answered accordingly.

This case coming on for final hearing this day before the Hon'ble Mr. Justice Srinivasan after the expression of the opinion of the Full Bench, the Court delivered the following Judgment :—

In view of the answer to the reference made to the Full Bench, the Judgment and Decree dismissing the suit have to be set aside. The suit is directed to be restored to file and disposed of on merits.

No order as to costs here.

V.S. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Jaya Sankar, Joint Trustee of Family Trust known as "Subramania Chettiar" Trust. .. *Petitioner* *

v.

Chandra Mouleeswara Chettiar .. *Respondent.*

Madras Court-fees and Suits Valuation Act (XIV of 1955)*—Sections* 25 *(a) and (d),* 30 *and* 38*—Applicability —Suit for a declaration of the plaintiff's right to joint possession with the defendant as trustees—Valuation for purposes of court-fee.*

The provisions of sections 25 (*a*) and 30 of the Madras Court-fees and Suits Valuation Act will apply only to cases where the plaintiff seeks exclusive possession. Section 38 would apply only to cases where joint possession is sought as substantive relief and not as a consequential one. Where joint possession is sought as a consequential relief there is no specific provision in the Act and it is the residuary provisions of section 25 (*d*) that would apply to such cases.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, East Thanjavur at Nagapattinam, dated 30th August, 1960 and made in O.S. No. 19 of 1959.

T. R. Ramachandran and *K. Chandramouli,* for Petitioner.

K. S. Champakesa Iyengar and *K. C. Srinivasan,* for Respondent.

G. Ramanujam for the Government Pleader (*A. Alagiriswami*) on notice from this Court.

The Court made the following

ORDER :—This Civil Revision Petition arises from an order of the learned District Judge of East Tanjore at Nagapattinam in O.S. No. 19 of 1959 directing the plaintiff to value the relief relating to item 1 of plaint A Schedule under section 30 of the Court-fees Act on the basis of the market value of the property and pay the deficit Court-fee. The suit is one for a declaration that the plaintiff and the defendant are the joint trustees of a certain family private trust entitled to be in joint possession and management of the trust and its properties and for certain consequential reliefs. The material clause in respect of item 1, is contained in clause (*c*) of the prayer paragraph of the plaint. It is as follows :

"That the plaintiff is entitled to reside in the house item No. 1 herein described in the schedule of the properties as such trustee."

*C.R.P. No. 1697 of 1960. 24th March, 1961. (3rd Chaitra, 1883, Saka).

According to the plaintiff, one Subramaniam Chetty who had no issue created a trust in respect of the suit properties and under the deed of trust he and the defendant, his natural brother, would be entitled to be in joint possession of the trust properties and administer the same. Paragraph 3 of the plaint sets out the provisions of the will which created the trust. Paragraph 4 states that the testator also provided that the descendants of the plaintiff's father should live in item 1 from generation to generation. It is clear from the plaint taken as a whole that the right to be in possession of the property was only in the plaintiff's capacity of a trustee. If the averments in the plaint were to be accepted, it would show that item 1 would also form part of the trust. The mere fact that the trustees are allowed to be in occupation of one of the items of the trust properties cannot make that the item is not trust property. A provision made for the purpose of the trust, to enable the trustees to reside and to manage the trust cannot take the property out of the trust properties and vest it in the trustees as owners. From the plaint it is clear that the case of the plaintiff is that item No. 1 formed part of the trust properties and that in his capacity as trustee, he wanted joint possession of the property along with the other trustee, *viz.*, the defendant. In his order, dated 12th August, 1960, the learned District Judge stated that according to the plaint, item 1 was not stated to be dedicated to the suit trust but that the parties should he held in possession of the same from generation to generation meaning thereby that ownership of the property was vested in them. I am unable to understand wherefrom the learned District Judge got the impression that the plaint stated that item 1 was distinct from the other trust properties. As I stated earlier the definite case in the plaint was that item 1 formed part of the trust and that the trustees should be in occupation of the same in their capacity as such. The plaintiff originally valued the plaint under section 28 of the Court-fees Act and paid a Court-fee of Rs. 200. The learned District Judge did not accept that valuation as correct. By his order, dated 12th August, 1960, he held that section 28 of the Court-fees Act would not apply to the case and directed the plaintiff to revalue the plaint in regard to item 1 of the plaint schedule properties with reference to prayer (*c*) to which I have made reference earlier. Thereupon the plaintiff valued item 1 in accordance with the provisions of section 25 (*d*) of the Court-fees Act, 1955 in a sum of Rs. 500 and paid the requisite Court-fee. The learned District Judge was not prepared to accept it as correct. By his order dated 30th August, 1960, he held that section 25 (*d*) would not apply to the case which in his opinion should be governed by the provisions of section 30. He has therefore directed the plaintiff to value item 1 in accordance with its market value and pay the Court-fee thereon. It is the correctness of this order that is challenged in this Civil Revision Petition by the plaintiff.

A reading of the plaint will show two things. (1) That all the properties in the suit are trust properties ; and (2) that the plaintiff is a joint trustee along with the defendant and he seeks a declaration and joint possession only in that capacity. There is no mention anywhere in the plaint of the plaintiff being entitled to possession in any capacity other than that of a trustee or to exclusive possession independent of the joint trustee. The question then arises, what is that provision in the Court-fees Act which would apply to the present case. The learned District Judge has held that section 30 would govern the case. In my opinion that provision cannot apply, as the suits contemplated under that provision are suits for exclusive possession and not joint possession. Section 38 which speaks of valuation of reliefs as to joint possession will not also apply to the present case, that being confined to cases where joint possession is sought as substantive relief and not as in this case as a consequential one. Mr. Ramanujam, appearing for the learned Government Pleader, has contended that section 25 (*a*) would apply. That provision relates to cases where the prayer is for a declaration and possession of the property to which the declaration relates. The possession contemplated under clause (*a*) would be exclusive possession. But that is not what the plaintiff seeks in the instant case. It is only joint possession that he seeks by way of consequential relief. In other words, what he seeks is to walk into the property without obliging the defendant to walk out of it. The relief thus sought does not involve the ejectment

for eviction of the defendant. In my opinion clause (*a*) of section 25 can be restricted only to cases where the possession sought would be one involving an eviction of the person in possession. That provision therefore cannot apply to a case like the present where the kind of possession sought allows the defendant to continue in occupation. As there is no other provision in the Act which will apply to a case where joint possession is sought as a consequential relief, section 25, clause (*d*), which is the residuary clause, would govern the case. It would follow that the valuation adopted by the plaintiff under section 25 (*d*) is the proper one and that the order of the learned District Judge is incorrect. That order is set aside and the Civil Revision Petition is allowed. There will be no order as to costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Manicka Goundar .. *Appellant**

v.

Arunachala Goundar and others .. *Respondents.*

Hindu Women's Right to Property Act (XVII of 1937), section 3 (2)—Nature of the interest taken by the widow under—Property passing by inheritance on the death of the last surviving coparcener—Inheritance is subject to rights of females under the Act.

K and *N* were members of an undivided Hindu coparcenary. *N* died on 10th January, 1950 leaving behind his widow. *K* died on 12th January, 1950 unmarried leaving his sister. *N's* widow sold the property to the plaintiff on 25th August, 1950 and *K's* sister sold the same to the defendant on 22nd February, 1951. On the question of the respective rights of parties

Held : The interest of the widow which is defined under the Hindu Women's Right to Property Act 1937 as the same interest which her deceased husband had, is not fixed or defined as on the date of the death of the husband, but is a fluctuating interest diminishing and augmenting by births and deaths in the family. The language of section 3 (2) of the Act itself warrants such a conclusion. The widow steps into the shoes of her deceased husband who is not yet completely dead by reason of his fictional existence as a legal persona in the body of his wife. The interest of the deceased coparcener itself was a fluctuating interest. The statute did not certainly confer a higher right on the widow than what her deceased husband himself had. The interest of the widow being a fluctuating one, the extent of that right has to be determined only as on the date when she sues for partition and not as on the date of the death of her deceased husband.

The death of the last surviving coparcener in a Hindu joint family lets in the law of inheritance and succession, if he died intestate. There can be no passing of property by survivorship to another coparcener, as the deceased was the last coparcener. But the person who inherits the property from the last coparcener can take it subject only to the rights of the female members of the family acquired under Act of 1937, before the death of such coparcener. The fluidity of the share of the female member can subsist only so long as there is scope for survivorship to operate that is so long as the coparcenary subsists. The female member is not a coparcener and she cannot therefore claim any property by right of survivorship. Once the coparcenary terminates by the death of the last surviving coparcener and his property passes on to another by inheritance, while the female member's vested rights under the Act are in no way defeated, she cannot prevent the operation of the law of inheritance and aspire to be placed in the position of the next heir of the last propositus.

Appeal against the decree of the Court of the Subordinate Judge, Cuddalore, in Appeal Suit No. 175 of 1956, preferred against the Decree of the Court of the District Munsif of Tirukoilur in Original Suit No. 159 of 1952.

S.R. Sadagopan, for Appellant.

C.S. Rama Rao Sahib and *T.S. Rama Rao*, for Respondent.

The Court delivered the following

JUDGMENT :—This Second Appeal has set a problem arising under the provisions of the Hindu Women's Right to Property Act, 1937.

The properties described in the C Schedule attached to the plaint in O.S. No. 159 of 1952 on the file of the District Munsif's Court, Tirukoilur, belonged to one

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*S.A. No. 1066 of 1958. 23rd September, 1960 (1st Asvina, 1882, Saka)

Hanumaji Rao, he having got them as a reversioner of the estate of one Raghunatha Rao. Subbanna Rao, the third defendant in the suit, purchased the properties from Hanumaji Rao under the sale deed, Exhibit A-1, dated 3rd April, 1940. There were two brothers, Krishnamurthy Rao and Nagoji Rao. Nagoji Rao died on 10th January, 1950 leaving behind his widow Kamala. Two days after the death of Nagoji Rao, his brother Krishnamurthy Rao, who was unmarried, also died. Nagoji's widow, Kamala, sold the suit properties to the first defendant in the suit under Exhibit B-2, dated 25th August, 1950. Krishnamurthy Rao's sister, Rukmani Ammal, the second defendant in the suit, sold the suit properties to the plaintiff under Exhibit A-10 dated 22nd February, 1951. The third defendant who had purchased the properties from Hanumaji Rao and in whose name the apparent title to the properties stood also executed a release deed, Exhibit A-9, dated 5th March, 1951, in favour of the plaintiff. The plaintiff averred that the third defendant was not the real owner of the properties despite Exhibit A-1 standing in his name, but that he was a benamidar for Krishnamurthy Rao, the brother of the said Nagoji Rao. Krishnamurthy Rao, having died, the plaintiff claimed, that his sister, the second defendant, was his next heir competent to convey the beneficial interest of Krishnamurthy Rao, in the suit properties. By way of abundant caution the plaintiff also obtained a release deed from the third defendant, the ostensible title holder. The plaintiff therefore prayed for declaration of title to the suit properties and for recovery of possession.

The first defendant alone contested the suit, defendants 2 and 3 having remained *ex parte*. His case also was that the third defendant was not the real owner of the property, but was only a benamidar. But according to him the third defendant was not a benamidar for Krishnamurthy Rao alone but was a benamidar for both Krishnamurthy Rao and Nagoji Rao, who together constituted members of a Hindu undivided family. He contended that Nagoji Rao, having died as an undivided coparcener entitled to a moiety of the suit properties his widow, Kamala acquired rights under the Hindu Women's Right to Property Act and that right, after the death of Krishnamurthy Rao, the other coparcener, became augmented into right in the entirety of the suit properties, and that was conveyed to him by her under Exhibit B-2. He therefore claimed that he was entitled to the whole of the property and that the plaintiff was not entitled to it, part or whole ;

After the institution of the suit the plaintiff filed an application for amendment of the plaint praying for the alternative relief by way of partition and separate possession of a half share in the suit properties. The plaintiff's case, therefore, was that either Krishnamurthy Rao was entitled to the whole of the suit properties or to at least a moiety if it were to be held that the other moiety belonged to his brother's widow, Kamala.

The learned District Munsif of Tirukoilur who tried the suit held that the third defendant was a benamidar for both the brothers, Nagoji and Krishnamurthy, who were members of a joint Hindu family and who continued to be so till their death. He held that the plaintiff did not acquire any interst in the suit properties under the conveyance in his favour from the sister of Krishnamurthy Rao as the widow of Nagoji Rao became entitled to the whole of the property by virtue of the operation of the Hindu Women's Right to Property Act. The suit was accordingly dismissed with costs.

The plaintiff preferred an appeal, A.S. No. 175 of 1956, on the file of the Court of the Subordinate Judge of Cuddalore challenging the correctness of the decision of the trial Court. The learned Subordinate Judge concurred with the finding of the trial Court that the third defendant was a benamidar for the two brothers and that the plaintiff's case that he was a benamidar for Krishnamurthy Rao alone was not true. But he disagreed with the trial Court and held that the plaintiff was entitled to a half share in the suit properties. He accordingly granted a preliminary decree for partition, thereby entitling the plaintiff and the first defendant each to share the properties, equally amongst themselves.

This Second Appeal has been preferred by the first defendant who claims that the decree of the trial Court should be restored. There is no memorandum of cross objections by the plaintiff claiming that he should get a decree for recovery of possession of the entire suit properties.

The concurrent finding of both the Courts below is that the brothers, Nagoji and Krishnamurthy, were members of an undivided Hindu family, and that the suit properties belonged to them as members of such family. That was the case set up by the first defendant in his written statement, and that finding is in his favour. The respondent-plaintiff has not challenged the correctness of that finding. The only point that arises for consideration is the extent or quantum of interest which Nagoji's widow, Kamala, held and possessed on the date of the alienation by her in favour of the first defendant under Exhibit B-2, dated 25th August, 1950. On the date of the death of Kamala's husband Nagoji, he had an undefined interest in the suit properties as a coparcener of a Hindu joint family. Krishnamurthy Rao survived his brother, Nagoji. But he did not and could not acquire the interests of his deceased brother by the operation of the rule of survivorship under the Hindu Law as Nagoji's widow who became vested with rights under the Hindu Women's Right to Property Act was a stumbling-block holding in abeyance the operation of such rule for the duration of her lifetime. The coparcenary interest of Nagoji in the suit properties devolved under the statute on his widow. Before the widow could enforce that statutory right and work it out by partition and severance of her share in the suit properties, the other coparcener was dead. Under those circumstances the question is what is the extent of the interest in the suit properties of the widow of the pre-deceased coparcener, whether it should be confined only to a half share which undoubtedly her deceased husband had, or whether it should be taken to have been augmented to the fullest extent by reason of the death of the surviving coparcener as well.

The Hindu Women's Right to Property Act was on the Statute book from April, 1937 for very nearly two decades till it was repealed by the Hindu Succession Act of 1956. It has given rise to knotty legal problems of great complexity. Judicial commentaries on the enactment are many and varied. The difficulty in interpreting the statute is caused not merely by its language which is not simple and plain, but by its being a fragmentary legislation concerning an aspect of Hindu Law of Succession and Devolution of Property. Gajendragadkar, J., as he then was, of the Bombay High Court commented upon the Act as follows in *Shivappa Laxman* v. *Yellawa*[1];

> "It is true that piece-meal legislation passed for removing obvious anomalies or making pressing progressive changes in Hindu Law tends to lead to complications ; because it is sometimes difficult to reconcile the new provisions made by the Amending Acts with the rest of the structure of the Hindu Law. The effect of the provisions of section 3 on the constitution of the surviving family after the death of a coparcener is an illustration in point. The undivided Hindu family would now consist of coparceners and a female who has a share in the properties of the family. The right to property is conferred on the widow without giving her the status of a coparcener. This position is likely to raise some problems which may not admit of a logically consistent answer. The question as to how the deceased husband's interest devolves upon his widow has given rise to conflicting views."

The relevant statutory provision which has to be construed is section 3, clause (2) of the Hindu Women's Right to Property Act, 1937, which is as follows :—

> " When a Hindu governed by any school of Hindu Law other than the Dayabhag school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had."

Section 3, clause (3) is as follows :—

> " Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Women's estate, provided however that she shall have the same right of claiming partition as a male owner."

The Federal Court has held in *Umayal Achi* v. *Lakshmi Achi*[2], that the property held by a person as the last surviving coparcener of a Hindu joint family cannot be re-

1. A.I. R. 1954 Bom. 47 at 49.
2. (1945) F. L.J. 8 : (1945) 1 M.L.J. 108 : 1945 F.C.R. 1 (F.C.).

garded as separate property within the meaning of section 3(1) of the Act, though the expression ' separate property ' may be an antethesis of three other expressions, *viz.*, ancestral property, coparcenary property and joint family property.

A few things emerging out of the interpretation of the Act are now well settled. The conferment of right to property in favour of certain female heirs under the Act, does not bring about a statutory severance in the undivided status of the members of the joint family. The female heir taking the property under the Act does not take it by the rule of survivorship, known to Hindu Law and operating between coparceners of a Hindu joint family. Nor does she take it by inheritance or succession. Such a mode of devolution of property though outside the concepts of Hindu Law has come to be recognised by reason of the statute. If it were to be held that the female heir takes by survivorship, it would implicitly make such heir a coparcener on a par with the male coparcener of the family. The Act however has not chosen to use language apt enough to make her a coparcener which she was not prior to the Act. If the taking of the property by the female heir were to be invested with the character of inheritance or succession, it would follow that the property succeeded to was the separate property of the deceased coparcener, which it cannot be in the view that the Act does not bring about a disruption of the joint family status. It is this difficulty which is not very different from being between Scylla and Charybdis that resulted in the Courts devising the formula of statutory devolution of property, and thereby adding a third category to the two existing modes of devolution of property under the Hindu Law. It is also well settled atleast so far as the decisions of this Court go that during the lifetime of the female heir entitled to the benefits of the Act to the extent of the interest of that heir the operation of the rule of survivorship as between the male coparceners is suspended and held in abeyance. If the heir happens to die without working out her rights the suspension is removed and survivorship commences to operate. This is based on the ground of legal fiction that in the body of the female heir, the widow, half the body of her deceased husband survives.

I shall now refer to a few decisions of this Court with a view to state what has so far been authoritatively laid down in the matter of the interpretation of the Act. In *Subba Rao* v. *Kishna Prasadam*[1], a widow, Ramabanamma filed a suit for partition against her father-in-law and the brothers of her deceased husband. She claimed one-fourth share in the joint family properties belonging to them under the Hindu Women's Right to Property Act. While the action was pending the plaintiff-widow died. Her minor daughter, Krishna Prasadam filed an application to be brought on record as the legal representative of her mother and prayed for relief to continue the suit. This application was resisted and the question for consideration was whether after the death of the widow the rights she had under the Act can be enforced or whether such rights were defeated by the operation of the rule of survivorship amongst other members of the family. At page 567 Venkatarama Iyer, J., as he then was, summed up the legal position thus :

"To sum up, section 3 (2) of the Act does not operate as severance of interest of the deceased coparcener ; the right which a widow gets under that section is not as heir of her deceased husband; it is a statutory right based on the recognition of the principle that a widow is the surviving half of her deceased husband; that the incidents of that right are those specified in the Act ; that such right is one personal to the widow and comes to an end on her death; that the estate which the widow takes under section 3 (2) does not, on her death, devolve on her husband's heirs; and that the right of the coparceners to take by survivorship is suspended as against the widow of a deceased coparcener and such right reasserts itself on her death."

In *Parappa* v. *Nagammal*[2], a Full Bench of this Court considered the nature and incidents of rights created under the Act. At page 192, Subba Rao, J. as he then was observed as follows :—

"The Act, therefore, has conferred a new right on the widow of a deceased coparcener in modification of the pre-existing law. Section 3 (2) of the Act does not bring about a severance of interest

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1. (1953) 2 M.L.J. 561 : I.L.R. (1954) Mad. 257.

2. (1954) 1 M.L.J. 250 : I.L.R. (1954) Mad. 183 (F.B.).

of the deceased coparcener. Certainly the widow is not raised to the status of a coparcener, though she continues to be a member of the joint Hindu family as she was before the Act. The joint family would continue as before, subject only to her statutory right. The Hindu conception that a widow is the surviving half of the deceased husband was invoked and a fiction was introduced, namely, that she continued the legal persona of the husband till partition. From the standpoint of the other male members of the joint family, the right to survivorship was suspended. The legal effect of the fiction was that the right of the other members of the joint family would be worked out on the basis that the husband died on the date when the widow passed away. She would have during her lifetime all the powers which her husband had, save that her interest was limited to a widow's interest. She could alienate her widow's interest in her husband's share; she could even convey her absolute interest in the same for necessity or other binding purposes. She could ask for partition and separate possession of her husband's share. In case she asked for partition, her husband's interest should be worked out having regard to the circumstances obtaining in the family on the date of partition. If she divided herself from the other members of the family during her lifetime, on her demise the succession would be traced to her husband on the basis that the property was his separate property. If there was no severance, it would devolve by survivorship to the other members of the joint Hindu family. This conception of the legal persona of the husband continuing to live in her steers clear of many of the anomalies and inconsistencies that otherwise would arise."

A question was raised whether the Full Bench decision referred to above was in any way inconsistent with the decision in *Subba Rao* v. *Krishna Prasadam*[1], so as to hold that the later decision has been overruled. This necessitated a reference to another Full Bench, the decision in which is reported in *Alamelu Ammal* v. *Chellammal*[2]. The Full Bench held that the ruling in *Subba Rao* v. *Krishna Prasadam*[1], was in no way affected by the Full Bench ruling in *Parappa* v. *Nagamma*[3]. This Full Bench however observed that the observation in the former Full Bench decision regarding succession to the interest of the widow after partition was merely obiter. The importance of the Full Bench decision in *Parappa* v. *Nagamma*[3], so far as this case is concerned is the observation of Subba Rao, J. that in the working out of the husband's interest by the widow in an action for partition the interest should be worked out having regard to the circumstances obtaining in the family on the date of partition.

It has been held in a number of decisions to a few of which a reference will now be made, that the interest of the widow, which is defined under the Act as the same interest which her deceased husband had, is not fixed or defined as on the date of the death of the husband, but is a fluctuating interest diminishing and augmenting by births and deaths in the family. There is sufficient warrant in the language of the statute itself for this view to be taken. The widow steps into the shoes of her deceased husband, who is not yet completely dead by reason of his fictional existence as a legal persona in the body of his wife. The interest of the deceased coparcener itself was a fluctuating interest which would abide by the varying fortunes of the family and the decrease and increase in the strength of the members of the family. The statute did not certainly confer a higher right on the widow than what her deceased husband himself had.

In *Mahadu Kashiba Vanekar* v. *Gajurabai Shankar Vavenkar*[4], the head-note summarises the legal position thus :—

"Under the Act the interest which a widow takes upon the death of her husband in her husband's property is a fluctuating interest, it is liable to decrease by the number of coparceners in the family increasing by a birth or adoption. On the other hand it is capable of augmentation in case one of the coparceners, who was alive at the time of her husband's death, dies subsequently.

The interest which she takes is not a separated interest, separated, that is, from the interest of the other members of the family, who may, of course, be coparceners. Her interest is like the interest of her husband, an undivided interest in the joint family properties, and even though she is entitled to file a suit for partition, the interest does not get separated, at any rate until the suit for parition is filed by her.

The family consequently continues to be a joint one till the widow files a suit or a separation of intèrest is otherwise brought about."

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1. (1953) 2 M.L.J. 561 : I.L.R. (1954) Mad. 257.
2. (1959) 1 M.L.J. 269 : I.L.R. (1959) Mad. 106 : A.I.R. 1959 Mad. 100 (F.B.).
3. (1954) 1 M.L.J. 250: I.L.R. (1954) Mad. 183 (F.B.).
4. A.I.R. 1954 Bom. 442.

To the same effect is the decision of the Orissa High Court in *Gangadhar* v. *Subhashini*[1]. At page 137 the learned Chief Justice (Panigrahi, C.J.) observed as follows :

The section provides that the widow shall have the 'same interest as he himself had' in that property at the time of his death. The interest is of a fluctuating character and is liable to be either reduced or augmented on the birth or death of a coparcener. If the husband of the widow had not sued for partition, his interest in the coparcenery property would be open to the risk of fluctuation. Can it be said that his widow gets a superior right under the Act.

Can she insist upon the identical share which her husband would have had at the time of his death ? One of the incidents of a coparcenary property is that no coparcener can predicate what his share is at any definite point of time, unless he gets his share separated by partition. It would be anomalous to hold that a widow would be entitled to claim a definite share which her husband would not have. The inclination of my mind is to hold that the Act gives the widow just what her husband had, namely, his undivided interest, subject to fluctuations, arising out of the varying fortunes of the family."

With respect I agree with the view expressed by the Bombay and the Orissa High Courts in the decisions cited above.

Reference may be made to the decision of the Nagpur High Court in *Ramachandra* v. *Ramgopal*[2], which specifically decided that the share of a widow claiming partition under the Act has got to be determined only as on the date of the institution of the suit, and not as on the date of the death of the husband of the claimant. In that case one Ramachandra had an one-third share in certain joint family properties belonging to him and to his two brothers, Ramgopal and Madangopal. Ramachandra had two sons, Trilokchand and Dwarakadas. Trilokchand died first in the year 1944 leaving behind his widow, Gitabai. Dwarakadas died next in 1947. In Ramachandra's suit for partition, Gitabai was impleaded as a party, as she undoubtedly had a share as the widow of the pre-deceased son of Ramachandra. At the time when Gitabai's husband died he had only an one-third share in the one-third of Ramachandra, that is an one-ninth share. On the date of the partition suit the other son of Ramachandra, Dwarakadas having died Gitabai could claim a half of one-third of Ramachandra, namely one-sixth. The question for consideration in that case was whether Gitabai was entitled to only one-ninth, or could she claim one-sixth. The Nagpur High Court decided that Gitabai's interest was a fluctuating one and her share became augmented after the death of her husband by reason of the death of another coparcener. At page 231 their Lordships observed:

" Sub-section (3) confers upon her a right to obtain a partition whenever she chooses. In other words, the Act specifically provides for the ascertainment and separate possession of the widow's share at such time as she desires to have it ascertained and separated. Since the property continues to be joint family property, despite the fact of the widow taking the place of her husband after his death she is like any other member of the family, entitled to the joint enjoyment of every portion of that property in the same manner as the other members of the family.

The question, therefore, of determining the extent of her share does not arise at the time of her husband's death just as it does not arise in respect of the other members of the family. That question arises only when the right to claim a partition is exercised either by her or by some other member of the family. It is therefore that date which is the crucial one for determining the quantum of interest or the extent of her share."

This decision was followed by a later decision of that Court reported in *Tukaram* v. *Mst. Gangi*[3]. The same view has been taken by a recent decision of the Andhra High Court in *Lakshmi Perumalu* v. *Krishnavenamma*[4].

I am of opinion that the language of section 3 (2) of the Act can only lead to that conclusion. The interest of the widow being a fluctuating one, the extent of that right has to be determined only as on the date when she sues for partition, and not as on the date of the death of her deceased husband. But the acceptance of this legal position cannot solve the problem arising in this case.

There is a detailed and exhaustive consideration of the widow's rights under the Act and her status qua the other members of the family in a decision of a Division Bench of this Court in *Manorama Bai* v. *Rama Bai*[5]. The following observations from the judgment of Ramaswami, J. may be quoted :

1. A.I.R. 1955 Orissa 135.
2. A.I.R. 1956 Nag. 228.
3. A.I.R. 1957 Nag. 28.
4. (1959) An.L.T. 318.
5. A.I.R. 1957 Mad. 269.

"The incidents of coparcenership can be conveniently summed up as every individual member having by virtue of being a coparcener, an interest in coparcenary property ; a righr to enforce partition ; until partition takes place an unpredictable and fluctuating interest in the joint and undivided property possessed and enjoyed in common by the coparcenary, the interest being a fluctuating interest enlarged by deaths and diminished by the births in the family ; right to be in joint possession and enjoyment of coparcenary property, reside and to be maintained in the family house ; and as a necessary corollary thereof, be bound by the alienations for benefit and necessity and the legitimate acts of management of the karta.

There does not seem to be any justification for saying that the widow is not a pucca coparcener and at the best is a kucha one not entitled to the rights of survivorship at least (the last male preserve) as a coparcener as she has no right by birth."

This decision has taken a step further than the earlier decisions of this Court in equating the status of a widow to that of a male coparcener under the Hindu Law. It must be pointed out that the concept of a widow being a coparcener of the joint undivided family as laid down in this decision is unique and is at variance not merely with the decisions of this Court including that of the Full Bench decision in *Parappa* v. *Nagamma*[1], but with all the decisions of the other High Courts as well. In accordance with this decision the first defendant in this suit will be entitled to the entire property and the plaintiff has got to be non-suited. But the decision is in conflict with the decision of the Full Bench in *Parappa* v. *Nagamma*[1] and another decision of a Bench of this Court in A.S. No. 299 of 1950.

It is necessary to refer to a decision of the Orissa High Court in *Kuluni Dei* v. *Jagabandhu Naik*[2], which expresses dissent from the decision of the Division Bench of this Court in *Manorama Bai* v. *Rama Bi*[3]. In that case there were two brothers, Bhagirathi and Balaram. Both the brothers died in the same month, Ocober-November, 1939 each with an interval of ten or twelve days, and Balaram died first. Balaram left behind his only heir, widow, Pitei. Pitei died sometime in April, 1944. Bhagirathi's widow was one Keluni defendant 1 in that action, and his daughter was one Malathi, defendant 2. The suit was instituted by the father's brother of Balaram claiming himself to be the heir entitled to succeed to the interest of Balaram after the death of his widow Pitei. The question for consideration related only to Balaram's interest, and the question was as to who was the preferential heir, Balaram's father's brother or the surviving widow of Bhagirathi, namely, Keluni. Their Lordships of the Orissa High Court held that Balaram's interest which passed on to Pitei under the Hindu Women's Right to Property Act, 1937, cannot pass in favour of Keluni by way of survivorship, and that the plaintiff namely Balaram's father's brother was the person entitled to succeed. Referring to the judgment of this Court in *Manorama Bai* v. *Rama Bi*[3], their Lordships observed at page 50 :

"We are not prepared to attach importance to this decision inasmuch as it being a Division Bench case, it goes beyond the decision of the Full Bench decision of the same High Court. It is to be noted, Ramaswami, J. who delivered the judgment in 1957 case, was also a party to the judgment of the Full Bench decision in the year 1954."

At page 51 their Lordships summed up the conclusion in the following words :

"The above considerations lead us to the position that after the death of Bhagirathi, the last coparcener, the coparcenary ceased to exist as the widows Keluni and Malati cannot in any event be termed as coparceners according to Hindu conception. Keluni and Pitei therefore possessed the properties of Bhagirathi and Balaram as tenants-in-common."

In A.S. No. 299 of 1950 *Seshi Ammal alias Dharmambal* v. *Lakshmi Ammal*, on the file of this Court, the facts were that one Mathrubutham Iyer died on 13th May, 1939 leaving behind his first wife, Lakshmi Ammal, a son by her, Ramamurthi, his second wife, Seshi Ammal and a son by her also. Ramamurthi the first wife's son became divided from his father during his lifteime. The father Mathrubutham and his son by the second wife remained undivided. The son by the second wife died on 23rd December, 1939. The first wife Lakshmi filed the suit out of which the appeal arose for partition and separate possession of a half share in the non agricultural properties of her late husband. The co-widow pleaded that the first

1. (1954) 1 M.L.J. 250 : I.L.R. (1954) Mad. 183 (F.B.)
2. A.I.R. 1958 Orissa 47.
3. A.I.R. 1957 Mad. 269.

wife will be entitled to only a quarter share. Her contention was that her son survived her husband and that he was the sole surviving coparcener of the family entitled to the property subject to the half share which the two widows, his mother and step-mother, might have together obtained and that on his death the property was inherited by her as his heir subject to the same right. This contention was upheld by this Court. The first wife who sued for partition was held entitled only to a quarter share. Panchapakesa Ayyar, J., observed as follows :

"To say that the plaintiff and the first defendant would be entitled to take a half share each, ignoring the birth and death of the male child of the first defendant, and the effect of his being the sole surviving coparcener and the last full male holder, would be running against the authority of Hindu Law."

I respectfully agree with this observation. The death of the last surviving coparcener in a Hindu joint family lets in the law of inheritance and succession, if he died intestate. There can be no passing of property by survivorship to another coparcener, as the deceased was the last coparcener. But the person who inherits the property from the last coparcener can take it subject only to the rights of the female members of the family acquired under the Hindu Women's Right to Property Act, 1937, before the death of such coparcener. The fluidity of the share of the female member can subsist only so long as there is scope for survivorship to operate that is so long as the coparcenary subsists. The female member is not a coparcener and she cannot therefore claim any property by right of survivorship. Once the coparcenary terminates by the death of the last surviving coparcener, and his property passes on to another by inheritance, while the female member's vested rights under the Act are in no way defeated, she cannot prevent the operation of the law of inheritance and aspire to be placed in the position of the next heir of the last propositus.

In my judgment, the plaintiff as the alienee from the heir of Krishnamurthy Rao is entitled to the suit properties subject to half share of Kamala under the Hindu Women's Right to Property Act, 1937, now got by the first defendant.

The judgment and decree of the learned Subordinate Judge are correct. The Second Appeal fails and is dismissed with costs. Leave granted.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

Allapichai Rowther .. *Appellant**

v.

Shree Chokkanathaswami Temple through its Hereditary Trustee and Poojari Sri Subramania Bhattar .. *Respondent.*

Madras Estates (Supplementary) Act (XXX of 1956), Section 10—If operates as a bar to the determination of the question whether the suit lands constitute an estate, or part of an estate by the Civil Court.

The bar of jurisdiction contemplased by Section 10 of Madras Estates (Supplementary) Act (XXX of 1956), was not intended to be operative beyond the period when the Tribunal could be properly seized of the matter. Since it has been established that in this case resort to the Tribunal is out of the question, the Civil Court is competent to determine the question whether the suit lands constitute an estate or part of an estate.

Appeal against the order of the Court of the Subordinate Judge of Sivaganga, dated 14th September, 1959 and made in Appeal Suit No. 31 of 1959 preferred against the decree of the Court of the District Munsif of Manamadurai, dated 29th January, 1959 and passed in O.S. No. 13 of 1958.

A. Sundaram Ayyar and *P. Balasubramanian*, for Appellant.

R. Kesava Aiyangar, for Respondent.

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* C.M.A. No. 255 of 1959. 2nd September, 1960. (11th Bhadra, 1882, Saka)

The Court delivered the following

JUDGMENT.—The respondent as plaintiff sued for a declaration of its title to half the produce in the suit lands and also to recover the value of the produce for faslis 1366 and 1367. The claim was based on the ground that the plaintiff temple was entitled to the lands as manibam. The contention of the defendant-petitioner was that the suit lands are lands in which the defendant has kudiwaram interest and that the Civil Court has no jurisdiction to try the suit. Upon these contentions issues were raised whether the suit lands are in an estate and whether Act XXX of 1956 is a bar to the plaintiff setting up that the suit lands are not in an estate. Though it is not quite clear from the issues, the principal point dealt with by the trial Court (District Munsif's Court, Manamadurai) was whether the civil Cour. had no jurisdiction to determine whether the suit lands are or are not in an estate. The learned District Munsif came to the conclusion that by reason of section 10 of Act XXX of 1956 the question whether the suit lands constitute an estate or part of an estate is not within the jurisdiction of the civil Court to determine. He accordingly dismissed the suit.

An appeal was taken by the plaintiff. The learned Subordinate Judge of Sivaganga examined the position and came to the conclusion that the civil Court's jurisdiction was not barred in so far as the determination of the question was incidental to the granting of the other reliefs. The decree of the learned District Munsif was set aside and the suit was remanded for fresh disposal. It is against this order that the present Civil Miscesslianeous Appeal has been filed.

The only question that arises is whether section 10 of Act XXX of 1956 operates as a bar to the determination of this question by the civil Court.

Act XXX of 1956 was passed with the object of "providing for the determination of questions whether any non-ryotwari area in the State of Madras is or is not an estate." Under section 5 certain Tribunals were constituted for the purpose of the Act and section 3 provided that any person interested may make an application to the Tribunal for a declaration that the area specified in the application is or is not an estate or part of an estate as defined in section 3, clause (2) of the Estates Land Act, or that it is or is not an inam estate as defined in section 2, clause (7) of the Abolition Act. Sub-section (2) of section 3 prescribes a period of limitation of three months from the date on which the Act came into force or three months from the date of publication of the order under section 3, sub-section (2) of the Rent Reduction Act, or of the notification under section 1, sub-section (4), of the Abolition Act whichever of the dates aforesaid was the latest, within which an application could be made by a person interested. Under sub-section (3) the Tribunal was granted the power to allow further time not exceeding three months for making the application. It is common ground that in so far as these lands are concerned no application had been made by any party interested within the period specified. Section 4 gave a special period of limitation to the Government. Under this section the Government could file an application either to the appropriate Tribunal or to the Special Appellate Tribunal constituted under section 7 of the Act within one year from the date on which this Act comes into force against a decision of any Court or of a Settlement Officer or Tribunal constituted under the Abolition Act. It would appear from these provisions that even if a civil Court had in the exercise of its jurisdiction before the coming into force of this Act or the other connected Acts given a finding as to the nature of any area, that is, whether it is or is not an estate or part of an estate, or is or is not an inam estate, such a finding could be challenged by the Government within one year from the date of coming into force of Act XXX of 1956. It is again common ground that in earlier suits between the parties this question had been determined in a particular way by the civil Court at a time when it had unquestioned jurisdiction to decide that question. It is not denied that these decisions were not challenged by the Government under section 4 of the Act. It is again conceded that after the expiry of the period specified in section 3 of the Act, which period has in fact expired, no person could approach the Tribunal for a determination of this question. The Tribunal even if it continues

to exist for the performance of any of the other functions under this Act would no longer be competent to determine this question for the simple reason that beyond the total period of six months provided by section 3, sub-sections (2) and (3), an application to the Tribunal for the determination of such questions would be incompetent.

The present position may briefly be stated to be thus. Before the passing of this Act or the relevant Acts by which the determination of such questions were otherwise provided for, the Civil Court had undeniable jurisdiction to deal with such a question. On the passing of this Act the Tribunal acquired the exclusive jurisdiction to deal with this question on application made to it within a specified time from the passing of the Act. Any decisions made earlier by a competent Court or a Settlement Officer or a Tribunal under the Abolition Act could be questioned by the Government within the period of one year from the date of the passing of the Act, failing which such earlier decisions would continue to be in force. The question is whether, under these circumstances, where the question had not been decided by the Tribunal constituted under this Act within the period specified in the section and the Tribunal is incompetent to entertain an application for a decision of that question, the jurisdiction of the Civil Court stands ousted for all time.

It has been argued on behalf of the appellant-defendant, who objects to the order of remand made by the learned Subordinate Judge directing the lower Court to try the suit afresh (holding that under the circumstances of the case this is a suit which comprises within its scope reliefs which only a civil Court is competent to grant and the question of the nature of the lands is incidental to the granting of this relief), that the decisions of this Court have held that the bar under section 10 of the Act is absolute, and that at the best it could only be regarded as a lacuna present in the Act which it is not the function of this Court to cure. According to the appellant it is true that the determination of this question by the Tribunal is impossible for the reason that the Tribunal would not have jurisdiction to entertain an application made in that behalf beyond the period of limitation prescribed by section 3. It is also true that this is not a case which would be governed by section 11 of the Act which deals with transitory provisions to cover all suits, appeals or other proceedings pending at the commencement of the Act before any Court or Tribunal or Settlement Officer, and which requires that such suits, appeals or other proceedings (other than those pending before the High Court) should stand transferred to the appropriate Tribunal for the determination of the question relating to the nature of the land. But nevertheless it is claimed that section 10 makes the bar to the civil Court's jurisdiction absolute. It would accordingly mean that this question about the nature of the land whether it is an estate, or not, or whether it is an inam estate or not cannot be tried by the Tribunal or even by the civil Court. It is argued that the Legislature failed to provide for a situation like the one which has arisen in the present case and that there is a lacuna in the Act which cannot be overcome.

In *Bhaskaran* v. *Sellappa Goundan*[1], the question arose whether under section 11 (1) of Act XXX of 1956, the civil Court should transfer a suit to the Tribunal in which the determination of the question is only incidental to the granting of other reliefs which could only be granted by the civil Court. The learned Judge held that the terms of this provision could not be read so as to justify a transfer of suits where the reliefs prayed in the suits could not be granted by the Tribunal and the section also contained no provision whereby after the determination of the particular question by the Tribunal the suits were to be brought back to the civil Court for decision of other issues in the suit. The view of the learned Judge was that notwithstanding that an issue whether a village was an estate or not within the meaning of the Madras Estates Land Act was raised in the suit and there was a special provision under section 11 of the Act whereby a pending suit of that nature had to be

1. (1960) 1 M.L.J. 183 : 1 L.R. (1959) Mad. 452.

transferred to the Tribunal for the determination of that question, such a transfer was not warranted where other issues in the suit which only the civil Court could deal with. This decision was considered by a Division Bench of this Court in *Hariharamuthu Pillai* v. *Rani Subbulakshmi Nachiar*[1]. The question that was principally considered by the Bench was as to the scope and effect of section 11 of the Act. It was held that the wording of section 11 is so comprehensive that all proceedings in which such questions arose for determination shall be transferred to the appropriate Tribunal for the determination of such questions, and the jurisdiction of the tribunal is not restricted only to cases involving implementation of the Madras Estates Land (Reduction of Rent), Act, 1947, or the Madras Estates Land (Abolition and Conversion into Ryotwari) Act, 1948. The learned Judges observed that while it was true that there is no provsion in any of the three Acts that would enable the Tribunal to dispose of the suit and there was also no express provision in section 11 for enabling suits to be re-transferred to the file of the civil Courts from that of the Tribunals, the transfer of the suits to the Tribunal was only for a very limited purpose, *viz.*, the determination of the question whether any particular area is or was an estate, or whether it is or was an inam estate. It was observed :

> " It will be noted that express words are used to oust the jurisdiction of every Court other than the Tribunals constituted under section 5 or the Special Appellate Tribunal constituted under section 7, when these two questions arise for determination, Section 10 specifically provides that no civil or revenue Court and no Tribunal constituted under any other law shall have jurisdiction to decide the questions. Section 11 provides that all proceedings in which this question arose except those pending in the High Court shall be transferred to the appropriate Tribunal for the determination of the questions. The words are so comprehensive that it would not be right to say that the jurisdiction of the Tribunal would arise only in those cases where efforts are made to implement the provisions either of the Rent Reduction Act or of the Abolition Act."

It will be noticed that the above decision really proceeded to explain the scope and effect of section 11 and the more general question as to the extent to which the jurisdiction of the civil Court stood ousted in circumstances as in the present case did not arise for consideration. It is no doubt true that section 10 purports to take away the power of the civil Court to determine such a question. But it seems to me that this provision has to be read in the light of the other provisions of the Act. The Act itself was for the purpose of providing for the determination of such questions. As has been made obvious by what I have said earlier, the position is that the Tribunal is incompetent to adjudicate upon an application calling for a determination of this question. The transitory provisions provided in section 11 cannot operate in the case of suits in which this question is raised and which suits were not pending on the date of the commencement of the Act. The normal rule being that a civil Court has jurisdiction unless it is expressly deprived of it the absence of any other Tribunal which can adjudicate upon that question seems to me to lead to the conclusion that the jurisdiction of the civil Court which was taken away by section 10 of the Act must be regarded as barred only during such period as the Tribunal or other authority appointed under this or any other Act was competent to deal with this question. If the argument that there is lacuna in the Act is to be accepted, it would mean that the party cannot approach the Tribunal ; nor can the civil Court have jurisdiction ; and if the determination of this question is necessary for the purpose of disposal of the suit before the civil Court, I fail to see in what manner the civil Court can discharge its functions. A lacuna, to my mind, should not be easily inferred, unless the enactment taken as a whole, must necessarily lead to that result. The conclusion is to my mind irresistible that the bar of jurisdiction contemplated by section 10 of the Act was not intended to be operative beyond the period when the Tribunal could be properly seized of the matter. Since it has been established that in this case resort to the Tribunal is out of the question, the civil Court is competent to determine this question.

It is not necessary for me to go into the question whether the earlier decisions operate as *res judicata*. That is a matter which will be gone into by the trial Court. The order of remand was rightly made and this appeal is dismissed with costs.

K.L.B. ——— *Appeal dismissed.*

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1. (1960) 1 M.L.J. 232.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI AND MR. JUSTICE VENKATADRI.

A.R. Sivaramakrishna Chettiar (Debtor) .. *Petitioner**

Banking Companies Act (X of 1949) as amended by Act LIII of 1953, sections 45-A and 45-B—Scope—Claims in respect of banking companies in liquidation—Adjudication as insolvent of a debtor of the Company—Whether within the jurisdiction of the High Court under section 45-B.

A question relating to the insolvency of a debtor of a banking company in liquidation does not relate to the winding up of that company and so falls outside the purview of section 45-B of the Act.

The word 'Claim' should be construed in a restricted sense with reference to the context in which it occurs in section 45-B. It is an accepted principle of interpretation that every general term occurring in a statute should be construed with reference to its context.

The mere possibility of the debt due to a banking company in liquidation being reduced by the adjudication of the debtor as an insolvent would not render the proceeding for adjudication of the debtor a claim against the Bank or a claim relating to the winding up of the Bank.

In the classification in section 45-B of the Act of the four proceedings which would be within the exclusive jurisdiction of the High Court engaged in the winding up of a banking company, the first two catagories come under claims made by or against a banking company in liquidation. The third category relates to cases of priority arising during the winding up proceedings. The last category relates to questions whether of law or of fact which relate to or arise in the course of a winding up of a banking company. The only permissible course of construction of the last class is to read in juxtaposition with the three other preceding classes of cases. Though the expression "question of law or fact which may relate to the winding up of a banking company" is very wide in its signification it must be understood with reference to its local colour or context. Read in this manner the question of law or fact which could be said to relate to the winding up of a banking company must be a question in the nature of a claim made by or against a Bank or in the nature of a priority arising during the course of winding up or related to the winding up proceedings as affecting any of the assets held by the Banking company in liquidation.

The question whether the leave of the judge would be necessary for prosecuting the insolvency proceedings before the subordinage judge was left undecided.

Shenoy v. *Raghunath*, I.L.R. (1959) Mad. 715 approved.

Interpretation of section 45-B in *Thangiah* v. *Hanuman Bank Ltd.*, A.I.R. 1958 Mad. 403 dissented.

Insolvency petition by the debtor abovenamed came on for a decision on the question turning upon the construction of section 45-B of the Banking Companies Act.

C. Vasudevan and *T. V. Srinivasan*, Advocates for the debtor-petitioner.

The Official Assignee of Madras in person.

The Order of the Court was delivered by

Ganapatia Pillai, J.—This is a debtor's Insolvency Petition under sections 10, 14 and 15 of the Presidency Towns Insolvency Act for adjudication of the applicant. When the proceeding originally came up before the Master he passed an order directing the matter to be placed before the Insolvency Judge since the question of jurisdiction of the High Court to entertain the application was raised by the Official Assisgnee which is not settled by any authoritative decision of this Court. When the matter came up before the insolvency Judge (one of us) it was found that there was a confilict between the view taken by Ramaswami, J., in *Thangiah* v. *Hanuman Bank*[1], following certain decisions of the Orissa High Court and the view taken by Ramachandra Iyer, J., in *Shenoy* v. *Raghunath*[2], regarding the scope and effect of sections 45-A and 45-B of the Indian Banking Companies Act as amended in 1953 (hereinafter referred to as the Act). Thereupon at the instance of one of us this petition has been referred to this Bench.

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* I.P. No. 10 of 1961. 14th April, 1961. (24th Chaitra, 1883, Saka)

1. A.I.R. 1958 Mad. 403.
2. I.L.R. (1959) Mad. 715.

The petitioner was carrying on a business in Dindigul which failed and a creditor of the petitioner obtained a decree for money against the petitioner and got him arrested in execution of that decree. Thereupon the petitioner filed I.P. No. 5 of 1959 in the Court of the Subordinate Judge, Dindigul.

One of the creditors of the petitioner is the Kannika Bank Limited, Dindigul, which is under liquidation by order of this Court. The Official Liquidator of the Kannika Bank raised an objection before the Subordinate Judge of Dindigul to the maintainability of the insolvency petition and the Subordinate Judge held that the insolvency proceeding could not be commenced without the leave of this Court which had charge of the winding up proceedings of the Kannika Bank and dismissed the insolvency petition. Thereupon the petitioner filed C.M.A. No. 45 of 1950 in the District Court, Madurai, against that order and that Court also dismissd the appeal relying upon the decision of Ramaswami, J. in *Thangiah* v. *Hanuman Bank*[1]. Against the order of the District Court a C.M.S.A. has been filed by the petitioner in this Court. He has also filed an application on the Original Side of this Court asking leave of the Company Judge to institute the insolvency proceedings in the Court of the Subordinate Judge at Dindigul.

We are not now concerned with the application for leave for instituting the insolvency proceeding in the Court of the Subordinate Judge, Dindigul, which will be heard and disposed of by the Company Judge. It was the Official Assignee who raised before the Master and before one of us sitting as Insolvency Judge the question whether the High Court on the Insolvency Side had Jurisdicion to entertain this application.

It is common ground that but for the winding up of the Kannika Bank by an order of this Court the insolvency Court having jurisdiction to entertain this debtor's petition would be the Court of the Subordinate Judge, Dindigul, where the insolvent was carrying on business and where most of his assets are located. Mr. Vasudevan for the petitioner contends that the Court of the Subordinate Judge of Dindigul has lost jurisdiction to entertain this application by reason of the provisions of sections 45-A and 45-B of the Act.

Before we deal with the argument addressed to us which indeed covered a wide field it may be necessary to state that we are not called upon to decide in an abstract manner what all proceedings are covered by section 45-B which gives exclusive jurisdiction to the High Court as the Company Court to entertain and decide claims by and against a Banking Company in liquidation. The short question for our determination is whether by reason of the provisions of sections 45-A and 45-B of the Act the jurisdiction of the Subordinate Judge of Dindigul which would be the Insolvency Court having jurisdiction under the Provincial Insolvency Act, if it applied to this case, is taken away and such jurisdiction is vested in this Court. By the Amending Act of 1950 Part III-A containing sections 45-A to 45-H was first inserted in the Banking Companies Act, 1949. By the Amending Act of 1953 that Part was enlarged and re-cast and the present provisions of sections 45-A to 45-X were introduced into the Act. Sections 45-A and 45-B, as amended in 1953 read thus :

"45-A. *Part III-A to override other laws.*—The provisions of this Part and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in the Companies Act, 1956 (I of 1956) or the Code of Civil Procedure, 1908 (Act V of 1908) or the Code of Criminal Procedure, 1898 (Act V of 1898) or any other law for the time being in force or any instrument having effect by virtue of any such law ; but the provisions of any such law or instrument in so far as the same are not varied by, or inconsistent with, the provisions of this Part or rules made thereunder shall apply to all proceedings under this Part.

"45-B *Power of High Court to decide all claims in respect of banking companies.*—The High Court shall, save as otherwise expressly provided in section 45-C, have exclusive jurisdiction to entertain and decide any claim made by or against a banking Company which is being wound up (including claims by or against any of its branches in India) or any application made under section 391 of the Companies Act 1956 (I of 1956) by or in respect of a banking company or any question of priorities or any other question whatsoever, whether of law or fact which may relate to or arise in the course of the winding up of a banking company, whether such claim or question has arisen or arises or such application

1. A.I.R. 1958 Mad. 403.

has been made or is made before or after the date of the order or the winding up of the banking Company or before or after the commencement of the Banking Companies (Amendment) Act, 1953. "

It is unnecessary to refer to old sections 45-A and 45-B of the Amending Act of 1950 as the new sections 45-A and 45-B have taken their place and they alone apply to this case. An analysis of the two sections yields the following result : exclusive jurisdiction is given to the High Court (the Court winding up the banking company to entertain and decide (*a*) any claim made by a banking company which is being wound up, (*b*) any claim against such a banking company, (*c*) any question of priorities arising in the course of winding up of such company, and (*d*) any other question of law or fact which may relate to or arise in the course of the winding up of such company.

Mr. Vasudevan, counsel for the petitioner, confined his arguments to the last clause in the above analysis and contended that this proceeding, *viz.*, the insolvency petition filed by the debtor though it did not arise in the course of the winding up of the banking company at least related to the winding up of such company. That is the narrow compass within which we have to decide the question arising in this case.

Mr. Vasudevan referred to the history of the various amendments of the Act for pointing out the purpose for which the Amending Act of 1953 was enacted. He relied on the following passage in the Statement of Objects and Reasons :

"Experience of the liquidation of a large number of banks that fell during the post-war and post-partition period disclosed that the procedure for the liquidation of joint stock companies was totally inadequate for the liquidation of banking companies in a manner satisfactory to the depositors. A bank has a far larger number of debtors than a joint stock company of a comparable size and the necessity to pursue legal proceedings against each debtor quite frequently in different Courts involved considerable expenditure and immense delay. In order to remove such difficulties the Banking Companies Act was amended in 1950.

The law thus amended, however, did not go far enough and complaints continued to be received about the distress to the depositors. The Committee was therefore appointed in July, 1950 to examine the difficulties and defects in the existing liquidation proceedings and to recommend changes in law, procedure and machinery in order to facilitate the speedy disposal of proceedings in liquidation. "

He stressed that the Amending Act of 1953 was therefore intended to prevent considerable expense and immense delay involved in the Official Liquidator being compelled to pursue legal proceedings against debtors of banking companies in various Courts and to facilitate speedy disposal of proceedings in liquidation.

It is of course manifest that in giving exclusive jurisdiction to the High Court under section 45-B the object was not only speedy disposal of the liquidation proceeding but also to avoid recourse to a multiplicity of Courts. Giving due weight to these objects of the enactment we are not satisfied that in interpreting the language of section 45-B we are compelled to hold that an application for adjudication in insolvency by a debtor of a banking company in liquidation should come up before the liquidation Court.

For our present purpose section 45-B may be condensed to read as follows :

" The High Court shall have exclusive jurisdiction to entertain and decide any claim which may relate to the winding up of a banking company ".

The claim to be adjudged insolvent by a debtor of a banking company Mr. Vasudevan argued, related to the winding up of the company because it affected the speedy realisation of the debt due to the banking company in liquidation and also the amount which may be realisable from that debtor. Mr. Vasudevan relied on some decisions which have interpreted the phrase. " any other question whatever, whether of law or fact which may relate to " a winding up of a banking company occurring in section 45-B. In *Jadunath* v. *Bank of Calcutta*[1], a Special Bench of the Calcutta High Court had to consider the question whether a suit filed against a banking company under liquidation for partition of certain immovable properties could be proceeded against in the Court in which the suit had been originally instituted, or the High Court alone had jurisdiction

1. A.I.R. 1952 Cal. 506 (S.B.)

to proceed further with that suit after the order for winding up of the company had been made. For that purpose the Court had to consider the language of section 11 of the Banking Companies Act of 1949 as it originally stood and which has now been replaced by section 45-C in Part III-A as introduced by the Amending Act of 1953. By reading section 11 along with sections 45-A and 45-B as they stood before the amendment in 1953 the Court posed the question for consideration thus : whether the proceeding in question has arisen out of or arises in the course of the winding up of the banking company. The Court assumed that the partition suit had not arisen out of the winding up but held that it arose in the course of the winding up. In coming to this conclusion the Court thought that the phrase " in the course of " means during the winding up. The reason given by the Court for holding that the partition suit must be deemed to have arisen in the course of the winding up was that it became necessary to make the liquidator a party to that proceeding. Following up this line of reasoning the Court laid down the test in such cases to be that if at any stage of a proceeding the liquidator becomes a party to it, it arises in the course of the winding up. Mr. Vasudevan urged upon us that this test should be adopted in the present case also and since in the insolvency proceeding the liquidator should be made a party as one of the creditors of the insolvent, the proceeding should be deemed to arise in the course of the winding up, or at least should be deemed to relate to the winding up of the banking company.

Before considering whether the test propounded by the Bench applies here we must make the comment that the authority of the ruling in the decision may not apply to this case because admittedly the insolvency proceeding here does not arise in the course of the liquidation proceeding. But, even granting that the test laid down in the abovementioned case would apply here, we have to see how far that test would be valid in the different context with which we are faced. The suit in the above decision was in respect of a property which was held by the bank as owner. Any claim made against that property in the hands of the bank under liquidation would be certainly a claim against the company. Obviously that would fall under the second class provided by section 45-B out of four classes of cases indicated in a prior portion of our judgment. On that ground alone the test propounded in the above decision cannot be held applicable to the present case.

Ramachandra Iyer, J., had to deal with a similar question in a different context in *Shenoy* v. *Raghunath*[1]. Counsel who appeared in that case relied upon a number of decisions for the contention that proceedings unconnected with the winding up would still come within the ambit of the exclusive jurisdiction conferred upon the High Court under section 45-B and all these decisions have been relied on by Mr. Vasudevan in his argument before us. They are *Dhirendra Chandra Pal* v. *Associated Bank of Tripura, Ltd.*[2]; *Shri Ram Narain* v. *The Simla Banking and Industrial Company, Ltd.*[3]; *Discount Bank of India* v. *Triloki Nath*[4], *Gurbinder Singh* v. *Munshi Ram*[5]. As is pointed out by Ramachandra Iyer, J., *Dhirendra Chandra Pal* v. *Associated Bank of Tripura, Ltd.*[2], related to a dispute between a person who was a tenant of the bank and the Official Liquidator and there the question which arose at the instance of the tenant of the bank was held to be a claim against the bank. That decision has therefore no application here. In *Shri Ram Narain* v. *The Simla Banking and Industrial Co., Ltd.*[3], the Supreme Court had to deal with a claim against a bank in liquidation in respect of its liability. That also falls under the category of the rule in *Dhirendra Chandra Pal* v. *Associated Bank of Tripura, Ltd.*[2], and cannot apply to the facts of the present case. In *Discount Bank of India* v. *Triloki Nath*[4], there was a claim by the bank against one of its constituents by way of a suit. As the suit related to realisation of a debt due to the bank the Court ruled that it related to the winding up of the bank and therefore the suit ought to be exclusively tried by the winding up Court. What we said above with reference to the two Supreme Court cases equally applies here. But, in *Gurbinder Singh* v. *Munshi Ram*[5], the question was whether a suit by an

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1. I.L.R. (1959) Mad. 715.
2. (1955) S.C.J. 197 : (1955) 1 M.L.J. (S.C.) 110 : (1955) 1 S.C.R. 1098.
3. (1956) S.C.J. 579 : (1956) S.C.R. 603.
4. A.I.R. 1953 Punj. 145.
5. A.I.R. 1954 Punj. 196.

assignee of a mortgage from a bank on the mortgage against a third party would come under the provisions of section 45-B of the Act. The learned Judges in that decision held that in regard to pleas raised in that suit wherein the bank was impleaded as a party the claim amounted to a claim against the bank and the suit was therefore triable only by the High Court., *viz.*, the Court which was in charge of the winding up proceedings of the Bank. That principle falls outside the scope of the controversy now before us. None of these decisions, therefore help Mr. Vasudevan in sustaining his argument that the insolvency proceeding now before us either arises in the course of the winding up proceedings of the Kannika Bank.

Mr. Vasudevan laid particular stress on the judgment of Ramaswami, J., in *Thangia* v. *Hanuman Bank*[1], where that learned Judge had to deal with the question of interpretation of section 45-B and, in so doing, he accepted as correct two decisions of the Orissa High Court in *H. Naik* v. *Jitendranath Das*[2], and *H. Naik* v. *Kanhu Charan.*[3] As was observed by Ramachandra Iyer, J., in *Shenoy* v. *Raghunath*[4], the facts of the decision in *Thangia* v. *Hanuman Bank*[1], probably justified the view taken by the learned Judge (Ramaswami, J.) as it could be contended that the properties in respect of which pattas were claimed by the ryots in that litigation were properties owned by the Hanuman Bank in liquidation. It is however, not clear from that decision whether such properties were acquired by the bank during the course of the winding up or even before the winding up order was made. Any way, the claim made by the ryots for patta would come under the category of a claim against the bank in respect of its assets. But, in construing section 45-B Ramaswami, J., approved of the two decisions of the Orissa High Court as laying down the correct rule.

We will therefore straightaway address ourselves to those decisions. But before we do so we may point out that one of the reasons which impelled Ramaswami, J., to take the view which he did was that the term " claim " occurring in section 45-B was a word of very extensive signification embracing every species of legal demand. According to the learned Judge, it was one of the largest words of law and included " demand " and "debt " and also signified a demand made up of a right or supposed right, a calling of another to pay something due or supposed to be due, as a claim for wages or services. In our opinion, the wide significance of that term ought not to be given undue importance in interpreting the langage of section 45-B by reference to the object of the legislation. It is an accepted principle of interpretation that every general term occurring in a statute should be construed with reference to its context. In our opinion the word " claim " should therefore be construed in a restricted sense with reference to the context in which it occurs in section 45-B.

We shall now examine the reasoning of the learned Judge (Narasimham, J., as he then was) in *H. Naik* v. *Jitendranath Das*[2]. There a judgment-debtor of a banking company in liquidation filed a petition before the District Judge of Mayurbhanj for being adjudged insolvent. He also filed an application before the Orissa High Court for granting him permission to proceed with that insolvency petition. The question for consideration was, where a banking company under liquidation was a decree-holder, whether its judgment-debtor was entitled to prosecute his petition for insolvency before the District Court with the permission of the High Court, or whether the High Court alone had jurisdiction to entertain such a petition. After noticing that the provisions of the Provincial Insolvency Act must give way before the provisions of the Banking Companies Act the learned Judge held that the proposed insolvency petition before the District Court was a proceeding which related to the winding up of the banking company and consequently the High Court alone had exclusive jurisdiction to entertain the insolvency petition. The learned Judge relied upon *Jadunath* v. *Bank of Calcutta*[5], for holding that the insolvency proceeding related to the winding up of the bank. We have already examined that decision and pointed out that the facts of that case do not justify the inference that the rule laid down therein applied to a case where exclusive jurisdiction is conferred on the High Court merely

1. A.I.R. 1958 Mad. 403.
2. A.I.R. 1954 Orissa 139.
3. A.I.R. 1954 Orissa 186.
4. I.L.R. (1959) Mad. 715.
5. A.I.R. 1952 Cal. 506.

by reason of the proceeding in question being related to the winding up of the banking company. On the other hand, that decision laid down that the proceeding in question there arose " in the course of " or during the winding up proceeding.

It is true the expression "relating to the winding up " is much wider and more extensive than the expression "arising out of the winding up". But even so one has to examine whether a claim for adjudication as an insolvent by a debtor of the banking company would relate to the winding up proceeding. At the highest it can be said that there is a distant connection between the insolvent proceeding and the winding up proceeding since the adjudication of the debtor as an insolvent might affect the prospect of early realisation of the debt due to the banking company from its debtor. Even this statement must be a qualified statement because it is common knowledge that even without a person being adjudged insolvent he may not have sufficient resources to pay up the entire debt due by him to the banking company under liquidation and consequently early collection of debt due by him to the banking company would be a problematical affair.

It will be pertinent for us in this connection to examine the scope of a proceeding by a debtor for being adjudged insolvent. The social object or purpose of bankruptcy law is not to enable creditors to realise their debts due by insolvent debtors. It object is as much the promotion of trade and the protection of the community against the continued activities of citizens who are insolvent by borrowing moneys even after they become insolvent as the protection of the insolvent himself and his rehabilitation. As an ancillary to the carrying out of these objects various provisions are found in the bankruptcy law prohibiting undischarged insolvents from borrowing moneys and for the realisation of the assets of the involvents and distribution of the proceeds among the creditors. Incidentally we may notice that the bankruptcy law affects the status of the insolvent who is deprived of many of the legal rights possessed by the citizens of the country in the matter of ability to enter into contracts, for dealing with his properties and for borrowing moneys on his being adjudged insolvent. To view the bankruptcy law as a device for the realisation of the assets of insolvent debtors and distribution of the proceeds among their creditors is, in our opinion, an erroneous assumption. Indeed, it is within our experience that in some insolvency cases though the person who is adjudged insolvent is not able to meet his liabilities as and when they fall due, on his estate being administered by the Receiver in bankruptcy sufficient money is realised and the entire debt due by him to the creditor gets paid up. The notion, therefore, that the adjudication of a person as an insolvent necessarily affects the rights which his creditors have in getting paid the entire money due to them by the insolvent may not be correct. It is true such adjudication alters the oridinary remedy which the creditors have in recovering their debts from the insolvent or from his estate. In that sense the banking company in liquidation could not pursue its oridinary remedy for recovering the debt from the insolvent debtor but must apply to the Receiver in insolvency for payment of the debt. True there may be some delay in the realisation of the assets of the insolvent and the creditors being paid dividends. This aspect has been stressed by the learned Judge (Narasimham, J.) as one of the main reasons why an application for adjudication of a debtor of a banking company in liquidation should be held to relate to the winding up of the company.

With all respect to the learned Judge we are unable to see how this purpose behind the legislation (section 45-B of the Banking Companies Act) could affect the interpretation of the language of the enactment. As was pointed out by Ramachandra Iyer, J., in *Shenoy* v. *Raghunath*[1], the interest which a banking company has over a security in the shape of a mortgage of immoveable property belonging to one of its debtors is in the nature of a commercial interest. No higher could be the interest of a bank in the question whether one of its debtors should be adjudged insolvent or not. The facts of the case show that in respect of the property for which partition was sought in the application before the learned Judge (Ramachandra Iyer, J.) the banking company held a mortgage from the manager of the joint family to

1. I.L.R. (1959) Mad. 715.

which the applicants belonged and it had no interest at all in the property except in its character as a mortgagee. The banking company itself was not the owner of the property and consequently, as was pointed out by Ramachandra Iyer, J. it could not be said that the claim for partition of that property was a claim against the bank. We are in respectful agreement with the view of Ramachandra Iyer, J. and, it follows, that the mere possibility of the debt due to a banking company in liquidation being reduced by the adjudication of the debtor as an insolvent would not render the proceeding for adjudication of the debtor a claim against the bank, or a claim relating to the winding up of the bank. Even this, as we have pointed out earlier, is only a qualified possibility since in certain contingencies it may cease to exist when the Receiver in bankruptcy is able to pay all the debts in full from out of the assets realised by him. We may also contemplate another contingency in which the insolvency of a debtor of a banking company in liquidation may have no relation at all to the winding up of that company.

It is well-known that under the provisions of the winding up of companies the liquidator is given power with the sanction of the Court to sell outstandings due to the company outright instead of instituting proceedings for the recovery of those outstandings. When such sale takes place and money is realised by the liquidator from the purchaser, the banking company ceases to have any interest in the concerned outstanding. The result would be that on such sale taking place by the liquidator the bank will have no more interest in the solvency or otherwise of its debtor.

If we accept Mr. Vasudevan's argument and hold that the High Court alone has exclusive jurisdiction to entertain this insolvency petition and after the insolvency petition is entertained by the High Court the liquidator happens to sell outright the outstanding due to the bank by the petitioner in the insolvency proceeding, what would happen to the pending insolvency proceedings? According to Mr. Vasudevan, after such outstanding is sold outright by the liquidator to a third party the Company Court could transfer the insolvency proceeding to the Subordinate Judge of Dindigul who would have had jurisdiction to entertain the insolvency petition but for the provision of section 45-B of the Act. The Official Assignee contested this position and argued that if the Subordinate Judge of Dindigul had no initial jurisdiction to entertain the insolvency application he would acquire no such jurisdiction merely because the debt due to the bank had ceased to be a debt of that character. It is not necessary to investigate the question further to find out if such transfer of a proceeding is permissible under the Companies Act in the case of a banking company under liquidation because the language of section 45-B does not lend any support to the view that the vesting of exclusive jurisdiction in the High Court is conditional or could be displaced subsequently by the happening of any event like the one mentioned by us above.

The learned Judge (Narasimham, J.) thought that the question whether a debtor of a banking company should be adjudged insolvent and should get the protection of the insolvency law was a matter relating to the winding up of a banking company both because of the object of section 45-B of the Act and of the repercussions which the adjudication of a debtor of a banking company as an insolvent would have upon the remedies which the liquidator of the banking company would otherwise have had in collecting the debts due to the banking company. In our opinion, these two reasons do not touch the crux of the question for our consideration, *viz.*, the true interpretation of section 45-B of the Act. The literal interpretation of the language of section 45-B might afford some support to the argument of Mr. Vasudevan. But in our opinion, this rule of interpretation of statutes is subject to a well-known exception. In *Alangavaram* v. *Municipal Council, Pollachi*[1], Rajagopala Ayyangar, J., has referred to this matter. And, he has extracted the observations

1. (1957) 2 M.L.J. 56 : I.L.R. (1957) Mad. 1020 at 1028.

of Pollack, C.B. in *Waugh* v. *Middleton*[1], and of Lord Selborne in *Caledonian Railway* v. *North British Railway Co.*[2]. We reproduce the observations of the learned Judges extracted in that decision :

"However plain the apparent grammatical construction of a sentence, may be, if it be perfectly clear from the contents of the same document that the apparent grammatical construction cannot be the true one, then that which, upon the whole, is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it (Pollock, C.B. in *Waugh* v. *Middleton*[1])".

Lord Selborne said :

"The mere literal construction of a statute ought not to prevail, if it is opposed to the intention of the Legislature, as apparent by the statute ; and, if the words are sufficiently flexible to admit of some other construction by which that intention can be better effectuated."

Having this rule in mind we shall now examine the language of section 45-B. The object of the legislature in enacting this provision was to confer exclusive jurisdiction upon the High Court engaged in the winding up of the banking company in respect of certain proceedings which but for such provision could not be entertained by this Court. In indicating the class of such proceedings the Legislature adopted the method of a classification into four categories. The first two categories come under claims made by or against a banking company which is being wound up. The third category relates to cases of priority arising during the winding up proceeding. Such question may be as between the banking company in its capacity as a creditor and a third party. The last category relates to questions whether of law or fact, which relate to or arise in the course of a winding up of a banking company. In our view the only permissible course of construction of the last class is to read in juxtaposition with the three other preceding classes of cases. Though the expression "question of law or fact which may relate to the winding up of a banking company" is very wide in its signification, it must be understood with reference to its local colour or context. Read in this manner, the question of law or fact which could be said to relate to the winding up of a banking company must be a question in the nature of a claim made by a bank or against a bank. or in the nature of a priority arising during the course of winding up or related to the winding up proceeding as affecting any of the assets held by the banking company in liquidation. Viewed in this manner the only conclusion possible seems to be that a question relating to the insolvency of a debtor of a banking company in liquidation does not relate to the winding up of that company.

The learned Judge (Narasimham, J.,) in the next decision in *H. Naik* v. *Kanhu Charan*[3], had to consider the question whether the claim of a banking company under liquidation for payment of its dues out of the compensation money due to one of its debtors under the Orissa Estates Abolition Act (I of 1952) was a claim which fell within the ambit of section 45-B of the Act. In answering this question in the affirmative the learned Judge observed that the question whether the amount due to the banking company should be realised in one lump sum or in instalments was a question of fact relating to the winding up of the banking company and would be thus within the exclusive jurisdiction of the High Court, and, consequently section 37(3) of the Orissa Act which provided for payment of the compensation in instalments should give way before the jurisdiction of the High Court under section 45-B of the Act and the High Court would have power to ignore the former provisions. We can only say with respect to the learned Judge that the proposition thus stated appears to be too wide and not warranted by the language of section 45-B.

Nothing which we have said so far should affect the question, or we should be deemed to have impliedly decided the question whether the leave of the company Judge would be necessary for prosecuting the insolvency proceeding before the Subordinate Judge, Dindigul. With respect, we dissent from the construction of section 45-B accepted by Ramaswami, J., following the two decisions of the Orissa

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1. (1853) 8 Ex. 352, 357: 155 E.R. (Ex.) 1383.
2. (1881) 6 App. Cas. 114, 122.
3. A.I.R. 1954 Orissa 186.

High Court mentioned above, and we agree with Ramachandra Iyer, J., in the interpretation placed upon it by him in *Shenoy* v. *Raghunath*[1].

The only other decision that remains to be noticed is that of the Andhra Pradesh High Court in *Vijaya Commercial Bank* v. *Sivaramakrishnayya*[2]. In that case Satyanarayana Raju, J., considered the very point which arises for our determination now. The learned Judge accepted the view of Ramaswami, J., in *Thangia* v. *Hanuman Bank*[3], and in support of that view he has referred to the decisions of the Supreme Court and the various High Courts which have been already noticed by us and distinguished. We do not find any other reason advanced by the learned Judge which requires special notice except the following observation of Ramachandra Iyer, J., in *Shenoy* v. *Raghunath*[1], quoted and relied on by him.

"It is only those matters which will facilitate the winding up of the banking company, *viz.*, the realisation of its assets and their distribution amongst the various persons entitled to them, that can properly be the subject-matter of an enquiry under section 45-B."

Commenting on this quotation the learned Judge Satyanarayana Raju, J., observed:

"For the purpose of this case, it is not necessary to consider the soundness of this view. The matter arising in this application is one relating to the liquidation of the banking company, *viz.*, the realisation of its assets and their distribution among the various persons entitled to them which, the aforesaid decision itself points out, can be the subject-matter of an enquiry under section 45-B."

With respect to the learned Judge we consider that the observation of Ramachandra Iyer, J., quoted by him does not bear the meaning which has been attributed to it by him. Even otherwise, we have already pointed out that the adjudication of a debtor of a banking company as insolvent does not affect the realisation of the assets of the banking company except by providing that instead of the liquidator filing a suit for realisation of the debt or getting an order of the Company Judge for payment of the debt he would have to apply to the Receiver in bankruptcy for payment of the debt or the dividend due upon that debt. In our opinion, by reason of this effect of adjudication of a debtor of a banking company that proceeding could not be said to be related intrinsically to the realisation of the assets of the banking company.

We are, therefore, of the opinion that this Court, as having seizin of the winding up proceeding of the banking company, would have no jurisdiction to entertain the insolvency petition of the petitioner. The matter will now go before the Insolvency Judge for disposal.

V.S. ——— *Orders accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VEERASWAMI.

M. Thirumalachariar .. *Appellant**

v.

S. P. Varadappa Chettiar .. *Respondent.*

Limitation Act (IX of 1908), Article 75—Waiver under—When could be relied upon—Burden of proof—Civil Procedure Code (V of 1908), Order 7, rule 6—Pleading under—Nature of.

Article 75 of the Limitation Act governs a suit, *inter alia*, on a bond payable by instalments, which provides that if default is made in payment of one or more instalments the whole shall be due. The starting point for limitation in such cases is when the default is first made unless the payee waives the benefit of the provision and then when a fresh default is made in respect of which there is no such waiver. Whether or not there is a waiver is a question of fact which should be pleaded and established if it is relied upon as a ground of exemption from the bar of limitation provided by Article 75. A Court cannot presume that a plaintiff would have waived the benefit and call upon the defendant to establish the contrary.

Ayyadurai Mudaliar v. *Ibramsa Rowther*, (1949) 1 M.L.J. 112, explained.

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1. I.L.R. (1959) Mad. 715.
2. (1961) 1 An.W.R. 291.
3. A.I.R. 1958 Mad. 403.

*S.A. No. 388 of 1959.

2nd February, 1961.
(12th Magha, 1882, Saka)

Gopala Menon v. *Abdul Azeez*, (1935) 68 M.L.J. 244, referred.

The provisions of Order 7, rule 6, Civil Procedure Code, require that if a suit is instituted after the period of limitation prescribed by law, the plaint should show the ground upon which exemption from such law is claimed. The rule is mandatory and an exemption claimed on a certain ground will not enable the plaintiff to support the exemption on another ground which has not been pleaded.

Palani Chetti v. *Sevugan Chetty*, (1932) 64 M.L.J. 317; *Mahadeva Sastrigal* v. *Marulai Reddiar*, A.I.R. 1933 Mad. 874 and *Ramaswami* v. *Anaiya Padayachi*, A.I.R. 1936 Mad. 545, referred.

Appeal against the decree of the Court of Chingleput in A.S. No. 74 of 1957 preferred against the decree of the Court of the District Munsif of Kancheepuram in O.S. No. 208 of 1955.

K. S. Champakesa Ayyangar and *K. C. Srinivasan*, for Appellant.

T. V. Balakrishnan, N. Vanchinathan and *A. Seshan*, for Respondent.

The Court delivered the following

JUDGMENT.—This is a defendant's Second Appeal arising out of a suit for recovery of a sum of Rs. 600 alleged to be due from him to the Commercial Funds, Ltd., Kancheepuram. The defendant was a subscriber to a chit conducted by the Funds. He took in auction a chit for Rs. 5,000 payable in 100 monthly instalments of Rs. 50 each . The first instalment was due on March 14, 1947, and the last was payable on May 14, 1951. Admittedly, the defendant paid all the instalments due up to September 14, 1949 ; but he failed to pay the subsequent instalments. The Funds were directed by this Court in O.P. No. 309 of 1949 to be wound up. The Official Receiver who was appointed as the Official Liquidator for realizing the outstandings of the Funds, sold the outstandings due to the Funds, to the plaintiff, the respondent in the present Second Appeal, by means of a sale deed dated May 17, 1954. The plaintiff, as such assignee, claimed to be entitled to realize the amount claimed in the suit. According to him, although he was entitled to a larger amount, he confined his claim to the sum of Rs. 600 being the instalments payable for the period from 14th December 1950 to 14th May, 1951. The suit was actually instituted on 1st July, 1955. The plaintiff pleaded that the suit was in time by virtue of Madras Ordinance V of 1953 and Madras Acts V of 1954 and I of 1955.

The main defence to the suit was one of limitation. The contention on behalf of the defendant was that the suit was governed by Article 75 of the First Schedule to the Limitation Act. This defence found favour with the trial Court, with the result that the suit was dismissed. The argument on behalf of the defendant in this Court was confined to the question of limitation. The trial Court found that under rule 6 of the Fund's bye-laws, the consequence of default in respect of any of the instalments was that the entire debt would become due from the date of the default ; and that no waiver of the benefit of this rule having been established by the plaintiff, the suit would be out of time under Article 75. A further argument was advanced before the trial Court that the suit would be within time by reason of an admission of liability on the part of the defendant in an earlier written statement filed by him in O.S. No. 186 of 1952 on the file of the District Munsif of Kancheepuram. That was a suit in which one Swaminatha Mudaliar, claiming to be an assignee of the debt, sought to recover the sum from the present defendant ; and in defence the defendant's plea was, *inter alia*, that the assignment itself was void and that he was, therefore, not liable for the debt. There was an alternative plea in the written statement that if the assignment were to be held to be good and valid, his liability would only extend to a sum of Rs. 600 and not to any larger sum. Actually, this written statement was not filed at the trial Court, but a reference to the alleged admission was found in the judgment, Exhibit B-3, in that suit. There was also a reference to the alleged admission in Exhibit A-5, another written statement, said to have been filed by the defendant before the Official Receiver, Chingleput. The trial Court, on a consideration of Exhibits B-3 and A-5, was of the view that the acknowledgment pleaded by the plaintiff to save the bar of limitation was not established.

On appeal by the plaintiff, the lower appellate Court took a different view on the question of limitation. In effect, it considered that waiver on the part of the plaintiff would, in such circumstances, be presumed, and that the suit would, therefore, be in time, under Article 75 of the Limitation Act. In support of this view the lower appellate Court relied on the decision of Mack, J., in *Ayyadurai Mudaliar* v. *Ibramsa Rowther*[1], allowed the appeal and decreed the suit. The aggrieved defendant has, therefore, come up to this Court in Second Appeal.

The main point urged by Sri K. S. Champakesa Ayyangar, the learned counsel for the appellant, is that the lower appellate Court was in error in supposing that waiver for purposes of the third column in Article 75 could be presumed in favour of the plaintiff. His contention is that the plaintiff, if he wanted to rely on it, must clearly plead waiver for purposes of the third column of that Article and prove the same just like any other fact by cogent evidence. His contention further is that the mere fact, that waiver might be to the benefit of the plaintiff, is not sufficient justification for the view that waiver can be presumed in favour of the plaintiff and that the defendant should prove that there is no waiver. I think the learned counsel is right in his contention. Article 75 of the Limitation Act governs a suit, *inter alia*, on a bond payable by instalments, which provides, that, if default be made in payment of one or more instalments, the whole shall be due. The period prescribed for such a suit is three years. The starting point as provided in column 3 is stated thus :

"When the default is made, unless where the payee or the obligee waives the benefit of the provision and then when a fresh default is made in respect of which there is no such waiver."

It is clear from this that the period of limitation commences the moment there is a default made in payment of the instalment due. A suit beyond three years from the date of such default would *prima facie* be out of time. It would be within time only if the plaintiff has waived the benefit of the default provision. Whether there is a waiver or not is a question of fact. Obviously it will have to be pleaded and established, if it is to be relied upon as a ground for the exemption from the bar of limitation provided by Article 75. The mere fact that waiver will be to the advantage of the plaintiff inasmuch as that will save him from the bar of limitation, will not *ipso facto* be a proper basis for the view that he should be assumed to have waived the benefit and that on that basis the defendant, who pleads to the contrary, should be called upon to establish the negative, namely, that the plaintiff has not waived.

Sri T. V. Balakrishnan, the learned counsel for the respondent, however, relies on the decision in *Ayyadurai Mudaliar* v. *Ibramsa Rowther*[1], and contends that only in cases where the plaintiff wanted to elect to enforce the default clause in the bond, Article 75 would be attracted. Mack, J., held on the facts in that case that in a suit on an instalment bond with a default clause Article 75 will only operate if the plaintiff elects to enforce the default clause which it is always open to him to waive or forego; and that in such cases his right to recover the instalments as on an ordinary instalment bond within three years prescribed by Article 74 of the Limitation Act remains unaffected. In that case the stake-holder kept an account of the moneys owed by the subscribers ; it was found in the account that he had credited the commission due to the defendant on the basis that he had committed no default. That clearly showed that the case for the plaintiff in that case was that the instalments had been paid and there was no default. In view of the fact that actually the commission was credited to the defendant on the basis that there was no default, it was apparent there was a waiver on the part of the plaintiff. On that basis the actual decision of Mack, J., in that case, if I may say so with due respect, was correct. But there are no doubt observations in his judgment which possibly lend some support to the view that waiver may be assumed in favour of the plaintiff as it would be to his benefit in such a case as this. But with great respect to the learned Judge, I can find no justification for that view in the language of Article 75, particularly

1. (1949) 1 M.L.J. 112 : A.I.R. 1949 Mad. 592.

that of column 3 thereof. On the other hand, my attention has been invited by the learned counsel for the appellant, to the decision in *Gopala Menon* v. *Abdul Azeez*[1], in which Madhavan Nair, J., was evidently of the view that waiver should be proved by the plaintiff by proper evidence. It is true that the learned Judge has not laid down such a proposition in so many terms but the approach of the learned Judge to the question was obviously on that basis. On the language of Article 75 I am clearly of the view that if the plaintiff wants to get the benefit of waiver in order to save time, he must specifically plead and establish the same by evidence. I can see no support in the language of that Article for the assumption that waiver will be presumed in favour of the plaintiff and that it is for the defendant to plead the negative and prove the same for purposes of Column 3 of Article 75.

On that view, there is no difficulty in holding in this case that the plaintiff has not established waiver. There is not even a plea of waiver in the plaint ; much less has there been any evidence directed on the point. It follows, therefore that, the suit was out of time and was rightly dismissed by the trial Court.

Sri T. V. Balakrishnan urges that the suit should be held to be in time on the ground that the defendant had acknowledged his liability to the extent of Rs. 600 in the written statement filed by him in O.S. No. 186 of 1952. But this ground of exemption from the bar of limitation was not specifically taken in the plaint. It is true that in the plaint it was pleaded that the suit was within time but that was on a different ground namely that Ordinance V of 1953 and the subsequent Acts already referred to saved the bar. Order 7, rule 6 of the Code of Civil Procedure requires that where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which the exemption from such law is claimed. This rule appears to be mandatory. It is not sufficient that a plea of exemption is made on a certain ground in order to permit the plaintiff to support the exemption on another ground not pleaded. So much appears to have been held by Cornish, J., in *Palani Chetty* v. *Sevugan Chetty*[2], and by Walsh, J., in *Mahadeva Sastrigal* v. *Marulai Reddiar*[3]. These two decisions have been followed by Venkataramana Rao, J., in *Ramaswami* v. *Anaiya Padayachi*[4]. In view of these decisions Sri Balakrishnan made an oral application to this Court for leave to amend the plaint. Obviously this request is too belated and cannot be allowed.

The result is the Second Appeal is allowed. The Judgment and Decree of the lower appellate Court are set aside and the suit will stand dismissed. The defendant will be entitled to his costs throughout.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KAILASAM.

Arumughavelu Thayammal and another .. *Petitioners**

v.

Karuppanna Thevar *alias* Mookayya Thevar .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955), *as amended by Act (XIV of* 1956), *section* 4-*A* (1), 4-*A* (3) *and* 4-*A* (4)—*Landlord's right to resume possession of land—Whether such right is subject to the right of the tenant under section* 4-*A* (3) *of the Act*.

Reading the provisions of section 4-A (1) and section 4-A (4) of the Madras Cultivating Tenants Protection Act together it is reasonable to construe that the right of the landlord to resume possession of lands not exceeding half of the extent of lands leased is subject to the condition enumerated in section 4-A (4), namely, that the landlord should not own more than 13⅓ acres of wet land or should not be in possession of an extent of 5 acres as owner or as tenant.

The words " in respect of the extent of the land which the landlord is entitled to resume" occuring in section 4-A (3) can only refer to the extent of lands referred to under section 4-A (1), that is half

1. (1935) 68 M.L.J. 244.
2. (1932) 64 M.L.J. 317.
3. A.I.R. 1933 Mad. 874.
4. A.I.R. 1936 Mad. 545.

* C.R.P. Nos. 1584 and 1588 of 1959.

10th March, 1961.
(19th Phalguna, 1882, Saka).

the extent of lands leased to the tenant and can have no reference to the extent specifically qualified under section 4-A (4) of the Act. There are no words in the section to indicate that the right conferred on the landlord to resume in section 4-A (4) is subject to section 4-A (3).

The intention of the framers of the Act could not have been to exclude the landlord from cultivating even one cent of land which will be the result if section 4-A (3) is held to qualify section 4-A (4). Such construction would mean that whatever extent the tenant may be in possession the landlord cannot take anything back from him.

Petitions under section 6-B of Act (XXV of 1955) as amended by Act (XIV of 1956) read with section 115, Civil Procedure Code, praying the High Court to revise the Order of the Court of the Assistant Collector, Dindigul, dated 18th May, 1959 and made in M.C.T.P.A. Nos. 62 and 63 of 1958.

R. Kesava Ayyangar and *S. R. Sadagopan*, for Petitioners.

K. Vaitheeswaran, for Respondent.

The Court made the following

ORDER.—Arumugavelu Thayammal and Sundaravalli Ponnu Thayammal are the landladies and the petitioners in C.R.P. No. 1584 of 1959. They filed C.T.P.A. No. 62 of 1958 before the Sub-Collector, Dindigul, for evicting the respondent-tenant under section 4-A of the Madras Cultivating Tenants Protection Act, 1955, as amended by Act (XIV of 1956). On 7th July, 1953, the tenant entered into an agreement of lease in respect of 11 acres and 63 cents with the mother of the present petitioners for a term of three years on a rent of 191 kalams of arisamba paddy and 120 bundles of hay. After the death of the mother of the petitioners, the petitioners as heirs became entitled to the land. They sold 2 acres out of 11 acres, 63 cents to one Sakkayasami Poodham Pullava Naicker on 4th June, 1958. The purchaser is the petitioner in C.T.P.A. No. 63 of 1958 and the petitioner in C.R.P. No. 1588 of 1959.

In both the petitions the petitioners prayed for permission to resume one-half of the extent of lands leased to the respondent for personal cultivation. The Revenue Court permitted the respondent under section 4-A (3) of the Act to continue in possession of the entire extent leased on payment of rent at the rate which was payable before 27th September, 1955. Aggrieved by the order the two petitioners have preferred these two revision petitions.

The question for consideration in these revision petitions is whether the landlords' right to resume possession of an extent of land either as owner or as tenant or as both to make up an extent of 5 acres of land under section 4-A (4) of the Act is subject to the right of the tenant under section 4-A (3) to continue in possession on payment of rent at the rate payable before 27th September, 1955.

Section 4-A runs as follows :—

"Notwithstanding anything contained in any other provision of this Act, a landlord shall be entitled to resume from any cultivating tenant possession for purposes of personal cultivation of lands not exceeding one-half of the extent of lands leased out to the cultivating tenant."

Section 4-A (2) is procedural and provides for the Revenue Divisional Officer holding a summary enquiry and for passing an order directing the cultivating tenant to put the landlord in possession or dismissing the application.

Section 4-A (3) and (4) runs as follows :—

"(3) Any cultivating tenant from whom any land is sought to be resumed by the landlord for purposes of personal cultivation, may offer to pay to the landlord in respect of the extent of the land which the landlord is entitled to resume for personal cultivation the rent at the rate which was payable to him before the 27th September, 1955 and the Revenue Divisional Officer shall thereupon pass an order permitting him to continue in possession on payment of such rent. The cultivating tenant shall, as long as he continues to cultivate that land be bound to pay rent accordingly."

"(4) Nothing in sub-section (1) shall be deemed to entitle any landlord to resume possession if, on the day the Madras Cultivating Tenants Protection (Amendment) Act, 1956, comes into force, he owns land exceeding $13\frac{1}{3}$ acres of wet land or he has been assessed to any sales tax, profession tax or income-tax under the laws relating to the levy of such taxes during 1954-55 or 1955-56 nor shall sub-section (1) be deemed to confer on the landlord a right to resume possession of a greater extent,

than that which along with the extent he is already in possession of either as owner or as tenant or as both would make up an extent of five acreas of wet land".

It may be observed that section 4-A confers an absolute right to the landlord to resume possession for personal cultivation of lands not exceeding one-half of the lands leased to the cultivating tenant. Though the sub-section starts with the words "notwithstanding anything contained in any other provision of this Act" it will have to be read along with the other provisions of the Act so as to avoid conflict. Section 4-A (4) specifically provides that nothing in the sub-section (1) shall be deemed to entitle the landlord to resume possession on certain conditions. Thus, section 4-A (4) specifically qualifies the absolute right given to the landlord under section 4-A (1). The provisions with which we are directly concerned in this case are (1) the disqualification attached to a landlord owning $13\frac{1}{8}$ acres of wet land, (2) the landlord being in possession either as owner or as tenant or as both as would make up an extent of 5 acres of land.

In the written statement before the lower Court the tenants in C.T.P.A. Nos. 62 of 1958 and 63 of 1958 contended that the petitioners owned more than $13\frac{1}{8}$ acres. This allegation was not gone into as the lower Court passed its order on section 4-A (3). In the view that I am taking it has become necessary to send the case back to the lower Court for the determination of the extent of land which the landlord owns. But for purposes of these revisions and for determining the question of law, I am proceeding on the basis that the landlord does not own $13\frac{1}{8}$ acres of wet land. Reading the provisions of section 4-A (1) and section 4-A (4) together it is reasonable to construe that the right of the landlord to resume possession of lands not exceeding half of the extent of lands leased out is subject to the condition enumerated in section 4-A (4) namely that the landlord should not own more than $13\frac{1}{8}$ acres of wet land or should not be in possession of an extent of 5 acres as owner or as tenant.

The difficulty arises in determining the effect of section 4-A (3) on section 4-A (1) and section 4-A (4). It has to be noticed that while section 4-A (4) starts by qualifying section 4-A (1) with the words "Nothing in sub-section (1) shall be deemed to entitle any landlord to resume possession......" no such qualifying words are found in section 4-A (3). Section 4-A (3) confers a right on the cultivating tenant to continue in possession of the land and resist the application of the landlord for resumption of lands for personal cultivation on payment of rent at the rate which was payable by him before 27th September, 1955. To this extent the absolute right given to the landlord under section 4-A (1) is curtailed though there is no specific clause as found in section 4-A (4) qualifying the operation of section 4-A (1) in section 4-A (3). As the various sections in the Act and the various sub-sections in the same section have got to be considered in a manner which will not give rise to conflicts, I am inclined to hold that the absolute right conferred on the landlord under section 4-A (1) is qualified by the tenant's right under section 4-A (3). But the more difficult question is whether a case in which the landlord's right to resume is specifically given under section 4-A (4) is qualified by the right conferred on the tenant under section 4-A (3). Section 4-A (3) comes after section 4-A (1) and before section 4-A (4).

The words in section 4-A (3) that "the tenant may offer to pay to the landlord in respect of the land which the landlord is entitled to resume for personal cultivation" can only refer to section 4-A (1). The words "in respect of the extent of the land which the landlord is entitled to resume" can only refer to the extent of land that is referred to under section 4-A (1), that is half the extent of lands leased to the tenant and can have no reference to the extent specifically qualified under section 4-A (4) of the Act. There are no words in the section to indicate that the right conferred on the landlord to resume in section 4-A (4) is subject to section 4-A (3). On the construction which I am inclined to put the position will be that, so far as half the extent of land to which the landlord is entitled to resume absolutely

under section 4-A (1), the tenant has an option to continue in possession under section 4-A (3) on payment of rent payable before 27th September, 1955. But if the landlord does not own $13\frac{1}{3}$ acres and is in possession of less than 5 acres of land he will be entitled to resume upto 5 acres of land and that right is not qualified by the right of the tenant under section 4-A (3). This in my view is the natural construction of the various clauses of the sub-sections in section 4-A. The construction is more in accordance with the scheme of the Act. The scheme of the Act is to protect the eviction of cultivating tenants and for adjusting the land tenure in the State for the maximum benefit of the landlord and the tenant. Section 4 of the Act gives a right to the tenant for restoration of possession. It provides that the tenant who was on the land on 1st December, 1953 and who is not in possession on the date of the commencement of this Act, shall be entitled to be restored to possession. But this right is denied to the tenant if the tenant, either as a owner or as a tenant was cultivating $6\frac{2}{3}$ acres. So also the landlord is given a right to resume if he is not in possession of 5 acres of land. Section 4-A (6) also provides that if the landlord after resuming possession of the land does not carry on personal cultivation the tenant is entitled to be restored to possession. Thus the scheme of the Act is that the tenant is entitled to restoration of possession if he is not cultivating more than $6\frac{2}{3}$ acres of land and the landlord is entitled to resume if he is not cultivating an extent of 5 acres of land. The intention of the framers of the Act could not have been to exclude the landlord from cultivating even one cent of land which will be the result if section 4-A (3) is held to qualify the section 4-A (4). For in that case the tenant will have an absolute right of continuing to be on the land on payment of rent payable before 27th September, 1955. Such construction would mean that whatever extent the tenant may be in possession the landlord cannot take anything back from him.

Learned counsel for the petitioners also submits that a construction which would deny the landlord the right to cultivation of even a cent of land if the tenant is willing to pay the rent payable before 27th September, 1955, will be most unnatural and in effect will vitally affect the rights of the landlord to hold property and such provision will be hit at under Article 19 (*f*) of the Constitution of India. He relies on a passage in the decision in *Sundararaja Iyer* v. *Sub-Collector, Dindigul*[1], where Rajagopala Ayyangar, J., has observed as follows:

"In our opinion it is based on a classification of bigger and smaller land owners and it has specified the reasonable extent of land which could be the subject of personal cultivation by the landlord himself It is therefore based on a reasonable classification."

Mr. Kesava Iyengar, learned counsel for the petitioner, stresses that if the construction of section 4-A (1) would result in complete deprivation of the right of the landlord to cultivate even a cent of land, the decision of the Bench would have been different. There is considerable force in the contention of the learned counsel. The intention of the Legislature would not have been to deprive the landlord of his right to cultivate any extent of land.

Mr. Vaitheeswaran, learned counsel for the respondent, relied on the unreported decision in C.R.P. No. 137 of 1959. Rajagopalan, J., was considering the effect of section 4-A (3) on section 4-A (1). His Lordship observed as follows:

"If that is the real position, it should be obvious there is no conflict at all between the provisions of sub-section (1) of section 4-A and those of sub-section (3). Sub-section (3) is virtually something like a proviso to sub-section (1), in the sense that the right conferred on the landlord by sub-section (1) of section 4-A is subject to the right conferred upon a cultivating tenant by sub-section (3) of section 4-A. The expression 'from whom any land is sought to be resumed by the landlord' and 'the land which the landlord is entitled to resume for personal cultivation' in sub-section (3) of section 4-A obviously refer to the provisions of sub-section (1) of section 4-A and these expressions should be construed to mean any land which is sought to be resumed by the landlord for purposes of personal cultivation under section 4-A (1), and the land which the landlord is entitled to resume for personal cultivation under section 4-A (1). Read in that light, it emphasises what I have stated before, that the apparently absolute right conferred on the landlord by sub-section (1) of section 4-A is subject to the right cnferred upon the cultivating tenant by sub-section (3) of section 4-A. Of course, but

1. (1957) 1 M.L.J. 307 at 312.

for section 4-A (3) the right conferred by section 4-A (1) on the landlord would be absolute. But for section 3 (7) of Act (XXIV of 1956), the right conferred on the landlord by section 4-A (1) and section 4-A (3) read together to receive the contract rate of rent would have been illusory. But section 3 (7) of Act (XXIV of 1956) specifically saved the operation of sub-section (3) of section 4-A of Act (XXV of 1955), the scope of which I have already explained. Thus in return for the right of receiving the contract rate of rent unaffected by the provisions of the Act (XXIV of 1956) the landlord's right of resumption, for which sub-section (1) of section 4-A provided, would become unenforceable, if the tenant exercises the right conferred upon him by sub-section (3) of section 4-A. That was what happened in this case. In my view there was no conflict between the provisions of sub-section (1) and sub-section (3) of section 4-A of Act (XXV of 1955), and the right of the landlord under sub-section (3), which in effect was in substitution of the right conferred on him by sub-section (1) of section 4-A, was not illusory ".

I most respectfully agree with the observations of the learned Judge, but his Lordship had no occasion to consider the provision of section 4-A (4) and whether the right given to the landlord under section 4-A (4) is in any way qualified by section 4-A (3). The right of the landlord who is actually in possession of less than 5 acres to resume an extent upto 5 acres of land cannot be said to be qualified by section 4-A (3). I hold the right of the landlord to resume under section 4-A (4) is not restricted by section 4-A (3) of the Act.

In the result I hold that the petitioners in both the cases are entitled to resume for personal cultivation the lands as the lands are less than 5 acres in extent. But in the written statements in both the C.T.P. A.'s the tenant has contended that the landlord owns more than 13⅛ acres of land. This allegation has not been gone into by the lower Court. The lower Court will go into this allegation and if it is found that the landlord owns more than 13⅛ acres they will not be entitled to resume the lands for personal cultivation and the tenant will be entitled to continue on payment of rent which was payable by him before 27th September, 1955. If they do not own more than 13⅛ acres of land they will be entitled to resume. C.R.P. No. 1584 of 1959 and C.R.P. No. 1588 of 1959 are allowed. M.C.T.P.A. No. 62 of 1958 and C.T.P.A. No. 63 of 1958 are remanded to the lower Court for disposal in the light of the observations made in this judgment. There will be no order as to costs in both the Civil Revision Petitions.

K.L.B. —— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE KUNHAMED KUTTI.

T. L. Jaganatha Iyer .. *Petitioner**

v.

B. H. Krishna Iyer and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 89—Deposit under—Reference to existence of certain antecedent or collateral proceedings and reservation of rights therein—If would affect the unconditional nature of the deposit.

It is no doubt true that a deposit made under Order 21, rule 89 of the Civil Procedure Code, to set aside a sale in execution of a decree, should be an unconditional one. It should be unconditional in the sense that it should not contravene the terms of the rule or frustrate its object. That is, the deposit should not be accompanied by any request or statement to prevent the decree-holder and auction-purchaser from unconditionally drawing the respective amounts payable to them under the rule. The deposit under rule 89 presupposes that the sale is without any irregularity and no application to set aside the sale under rule 90 could lie. A statement in an affidavit accompanying the petition under Order 21, rule 89, that the deposit is made without prejudice to his right in collateral proceedings, not being those under Order 21, rule 90, can only be a statement of fact or of certain legal rights and they cannot be held to contravene the provisions of Order 21, rule 89 and affect the nature of the deposit, if it is otherwise unconditional.

Ramayya Chetty v. *Krishnayya Chetty*, (1958) 1 An. W.R. 369, followed.

Edward Mathuram v. *Abdul Latiff Sahib*, (1949) 1 M.L.J. 447, overruled.

Case-law referred.

* C.R.P. No. 1326 of 1958.

13th February, 1961.
(24th Magha, 1882, Saka.)

Petition under section 115 of Act (V of 1908) praying the High Court to revise the Order of the District Court of Madurai dated 7th July, 1958 and made in C.M.A. No. 5 of 1958, O.S.E.A. No. 656 of 1957 in O.S.E.P. No. 521 of 1957 on the file of the Court of the District Munsif, Madurai Taluk, at Madurai in O.S.E.P. No. 517 of 1956 on the file of the Court of the District Munsif, Madurai Town, at Madurai, in S.C. No. 195 of 1953 Sub-Court, Dindigul.

M. Natesan, for Petitioner.

K. V. Srinivasa Ayyar, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This Revision Petition raises the question whether making reference to the existence of certain antecedent or collateral proceedings and the reservation of rights in regard to the same in a petition accompanying a deposit under Order 21, rule 89, Civil Procedure Code could be said to make the deposit otherwise than an unconditional one. The auction-purchaser who resisted the application to set aside the sale is the petitioner. In E.P. No. 570 of 1956 on the file of the District Munsif of Madurai Taluk, the decree-holder applied in execution of a Small Cause decree, for attachment and sale of a certain immovable property belonging to the judgment-debtor. Execution was resisted on the ground that the decee had been previously satisfied. An application, E.A. No. 1430 of 1956, was also filed to record satisfaction of the decree. The latter application was dismissed for default of appearance and execution was directed on the former. An application was then filed to restore E.A. No. 1430 of 1956; that too had to be dismissed for non-appearance of the judgment-debtor. Yet another application, E.A. No. 1008 of 1957, was filed to restore the previous one. In the meanwhile the decree-holder proceeded with the execution, and, in the sale held by the Court on 27th September, 1957, the petitioner purchased the property. Within the time limited by law, the judgment-debtor, depositing the amount specified in the sale proclamation together, with 5 per cent. of the purchase money as solatium to the auction-purchaser, filed an application under Order 21, rule 89, Civil Procedure Code, for setting aside the sale. The lodgment schedule accompanying the deposit was unconditional; but in the petition, there was a statement to the following effect:

"The property mentioned in the execution petition was sold in auction on 27th September, 1957, for Rs. 1,030, and the application is posted to 30th October, 1957, for hearing. As the petitioner's minor son has a share in the property, the sale should not be confirmed, as per the order of the District Court, Madurai. Notwithstanding that, having regard to the interest of the aforesaid minor and the petitioner himself, and with a view to protect the same and for the benefit of the minor, the amount mentioned in the lodgment schedule has been deposited with the minor's mother. This petition is filed without prejudice to the petition in E.A. Nos. 631 and 632 of 1957".

The application to set aside the sale was opposed by the auction-purchaser who evidently wished to retain the benefit of his purchase. The learned District Munsif dismissed the application on the ground that the reservation of the rights of the judgment-debtor in regard to E.A. Nos. 631 and 632 of 1957 was inconsistant with the unconditional nature of the deposit required under Order 21, rule 89, Civil Procedure Code. This view, however, was not accepted by the learned District Judge on appeal, who, considering the statement as merely of an existing fact, namely, the pendency of E.A. No. 631 and 632 of 1957, held that the deposit was not conditional one. The sale was accordingly set aside. In so doing the learned District Judge followed the decision of Viswanatha Sastri, J., in *Ramayya Chetty* v. *Krishnayya Chetty*[1], and distinguished that of Govinda Menon, J., in *Edward Mathuram* v. *Abdul Latiff Sahib*[2]. We are however unable to appreciate how the former decision which, expressly dissenting from the latter, holds that reference to collateral proceedings and the reservation of rights in regard thereto in an application under Order 21, rule 89, Civil Procedure Code, would not make the deposit a conditional one, can be followed if the latter, namely, *Edward Mathuram* v. *Abdul Latiff Sahib*[2],

1. (1958) 1 An. W.R. 369.
2. (1949) 1 M.L.J. 447.

is taken as containing a correct statement of the law. It has therefore to be seen which of the two views is correct.

In *Edward Mathuram's case*[1], the judgment-debtor, while making a deposit under Order 21, rule 89, stated by his affidavit that the deposit was made

"without prejudice to his contentions in the appeal against the decree in the suit and to his right to recover the sum from the decree-holder, in the event of his success therein."

The learned Judge held that the deposit should be deemed to have been made under protest, and thus not being unconditional, could not be considered as a valid one to entitle the judgment-debtor to have the sale set aside.

The question whether the reference to pending proceedings or the reservation of the rights of the judgment-debtor in regard to other collateral matters would make the deposit made one not in accord with the provisions of Order 21, rule 89, Civil Procedure Code, has to be considered in two aspects: (1) on the terms of Order, 21, rule 89 and (2) whether under the law a deposit under that rule would take away the rights of the debtor to challenge such antecedent proceedings for if under the law the deposit has not the effect of prejudicing the debtor's other rights a mere statement of that law or about the pendency of the proceedings, cannot make the deposit any the less a proper one.

Rule 89 states :—

"(1) Where immovable property has been sold in execution of a decree, the judgment-debtor, or any person deriving title from the judgment-debtor or any person holding an interest in the property may apply to have the sale set aside on his depositing in Court :

"(a) for payment to the purchaser, a sum equal to 5 per cent. of the purchase money, and (b) for payment to decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of the proclamation of sale, have been received by the decree-holder:

Provided that where the immovable property sold is liable to discharge a portion of the decree-debt the payment under clause (b) of this sub-rule need not exceed such amount as under the decree he owner of the property sold is liable to pay.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application, under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale".

Sub-rule (1) requires that money should be deposited for payment to the decree-holder and the auction-purchaser. That necessarily implies that no impediment or restraint should be placed on those persons withdrawing the amount deposited as it is made for the specific purpose of being paid over to them. Therefore nothing should be said or done which would impair their right to draw the respective amounts *e.g.*, there should be no payment under protest nor could they be required to give security, etc. Sub-rule (2) requires that an application under rule 89 can be filed, only if, the applicant does not challenge the sale under rule 90, that is, he should accept the regularity of the sale. Thus the rights given to a judgment-debtor under Order 21, rule 89 are mutually exclusive. On the terms of the former rule, no question of the correctness of either the decree in execution of which the sale is made, or even of legality of the order for sale arises. A mere payment under rule 89 cannot therefore mean that the judgment-debtor admits that either the decree is valid, or that the order for sale is legal. The provision contained in rule 89 is one for setting aside the sale and not for the final determination of the dispute between the parties. The rule assumes the existence of a valid decree and order for sale and provides for a case where sale ensues as a result thereof. It does not provide for a contingency where that assumption is found to be wrong, *i.e.*, if in appropriate proceedings the decree or the order for sale has been set aside. In such a case the Code provides for restitution and there is nothing in rule 89 to nullify or take away that right. There are no words in the rule which expressly deny the judgment-

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1. (1949) 1 M.L.J. 447.

debtor his right to challenge either the correctness of the decree or of the order for sale or of his other rights under the law, for example, one under Order 21, rule 2, for recording satisfaction of the decree. The question then is, can such a disability be implied? It is contended that the deposit being one made to pay the decree-holder and the auction-purchaser, there can be no dispute thereafter outstanding between the parties, and that what a deposit under rule 89 was intended to achieve was a termination of all outstanding disputes between the decree-holder and the judgment-debtor in regard to that litigation. Therefore, the judgment-debtor could never get back the deposit and any statement made which would derogate from unqualified right of the decree-holder to retain that money would be inconsistent with the rule. In other words, the argument ran thus: Rule 89 affords an indulgence to the debtor who defaulted in paying off the decree; payment thereunder is purely voluntary; it should be held to be in satisfaction of such rights as the decree-holder and auction-purchaser then possessed. Being a payment in discharge of such rights as the decree-holder then possessed, no question of restitution can thereafter arise even if it turns out that the decree or order for sale was wrong and all disputes between the parties should be deemed to have been put an end to by the payment. This contention is opposed to the provision of rule 89 itself. Sub-rule (3) contemplates a further liability of the debtor in regard to costs and interest not covered by the proclamation of sale, thereby indicating that the deposit is not to be in liquidation of all such rights as the decree-holder had. Reliance is however placed on the observations of Venkatasubba Rao, J., in *Kumma Kutty* v. *Neelakandan Nambudiri*[1], where, the learned Judge, after referring to the rule, observed at pages 947 and 948:

"Its object is to put an end to every kind of contention and dispute. The judgment-debtor is saved from the threatened deprivation of his property; the decree-holder's claim is satisfied and the auction-purchaser is compensated. The section would be frustrated if the person paying money under it is permitted to do so under protest. Clause (2) of rule 89 enacts......This shows that the two proceedings referred to in this clause are utterly incompitable. If the debtor wants to keep a dispute open, he cannot claim the benefit of this section. In fact, this accords to him a special indulgence. While he is thus favoured, care is taken to provide that the interests neither of the decree-holder nor of the purchaser are sacrificed. It follows from this that, when the judgment-debtor pays the amount specified, he pays it unconditionally. The payment followed by the order setting aside the sale has the effect of automatically extinguishing the decree-debt. If an application is made under rule 89 and the deposit required by that rule is made within thirty days from the date of the sale, the Court has no option but to make an order setting it aside. (*See* rule 92). This assumes that the decree debt is discharged and the decree-holder's remedy is gone. The section, then, is inconsistent with the notion that payment can be made either under protest or coupled with conditions."

These observations cannot be read as laying down that, once a deposit under Order 21, rule 89 is made, the judgment-debtor could not, thereafter, agitate his rights in regard either to the validity of the decree which resulted in the sale, or of the order directing the sale. That no such absolute proposition was intended to be laid down, is made clear by the learned Judge himself in a later case, *Pappu Reddiar* v. *Pichu Ayyar*[2], where referring to the foregoing observations, he observed at pages 832 and 833:

"In the former case, it has been held that Order 21, rule 89 is inconsistent with the notion that payment can be made either under protest or coupled with conditions. True, but the whole judgment proceeds upon the footing, first that there was a subsisting decree, that is, subsisting in fact and secondly, there was a decree-holder, one who really answered that description................Order 21, rule 89 assumes the existence of a 'decree' and of a 'decree-holder' and where the very foundation is gone, namely, a subsisting decree, it would be futile to contend that the decisions which refer to unconditional payment can apply".

The actual decision in *Kumma Kutty* v. *Neelakandan Nambudri*[1], related to the validity and enforceability of a security bond executed by the decree-holder in compliance with a conditional deposit made under Order 21, rule 89. It was held that an executing Court had no jurisdiction to impose conditions by way of demanding security or otherwise when money deposited under rule 89 was withdrawn by the decree-holder. Learned counsel for the petitioner contends that once a sale takes

1. (1930) 59 M.L.J. 893: I.L.R. 53 Mad. 943.
2. (1939) 1 M.L.J. 829.

place the title of the judgment-debtor is lost and what he can do thereafter is only to purchase the property back as it were, by taking advantage of rule 89. We are of opinion that that approach to the question is wrong. The rule statutorily provides for the setting aside of a sale in execution; while the jurisdiction thereunder can be exercised only if the prescribed conditions are satisfied, it would be wrong to call it a mere privilege or indulgence. The Code which provides for the sale provides also for setting it aside. Rule 89 provides for an opportunity to the debtor to save his property from a forced sale. The object of the rule is to set aside the sale and not to put an end to all disputes between the parties. That rule would apply irrespective of the fact that the decree, etc., has been appealed against or not. The scope and utility of the rule would be impaired and its object frustrated if it were to be held to apply only to cases where there is no appeal or if there is one where the debtor withdraws his right to prosecute it.

A mere filing of appeal does not operate as a stay of execution of the decree appealed from. Per contra, the levy of execution cannot prejudice the right of the debtor, to obtain restitution in case he succeeds in the appeal. It is not and indeed cannot be disputed that if a judgment-debtor pays voluntarily the amount due under a decree, he could on a reversal of the same recover back the money so paid. Equally would he be entitled to restitution if a property of his is sold in execution of a decree which is set aside later. The result cannot be different, if the debtor makes a payment under the provisions of Order 21, rule 89, after the sale, for even that is only the consequence of a forced Court sale. The right to appeal from a decree or an order it execution determining the rights of the parties, is a statutory one. So too is the right to file an application under Order 21, rule 2, Civil Procedure Code. A right to have the sale set aside under Order 21, rule 89, is also one conferred by the statute. Both the rights are independent, arising at different stages of a litigation. They are not mutually exclusive in the sense that resorting to one remedy would preclude the availing of another or of an earlier right. In other words, a right to appeal against a decree or an order for sale or a right to have satisfaction of a decree recorded cannot be lost, unless the statute expressly says so. Section 144, Civil Procedure Code and the inherent power of the Court to grant resitution contemplate that, in case of reversal of the decree or of the order, the aggrieved person should obtain restitution. That right cannot be prejudiced by doing something which a debtor is forced by circumstances to do, *i.e.*, to have the sale set aside under rule 89. That a contrary view would lead to unjust results will be clear from an illustration. Suppose a third party *bona fide* claimant to a property which is attached in execution of a decree makes a deposit under rule 89, pending a suit under Order 21, rule 63, Civil Procedure Code and that amount is withdrawn by the decree-holder and auction-purchaser. Can it be said that either under the law or any principle of justice, he should be precluded from getting back the money, in case he succeeds in the suit and that he so should for saving his property from being taken away wrongfully, pay up another person's liability under the decree unconditionally? The answer can only be in the negative. In *Pappu Reddiar* v. *Pichu Aiyar*[1], by the fraud of the decree-holder a satisfied decree was executed; the sale in execution was set aside by a deposit under Order 21, rule 89, Civil Procedure Code. The learned Judges held that the money paid under that rule could be recovered back by the person making payment as it was not a voluntary payment. In *Raman Adiyoty* v. *Kunnan Nambiar*[2], a person, who made claim to a property sought to be sold in execution of a decree, avoided the sale by making a deposit under Order 21, rule 89, Civil Procedure Code. Subsequently, he succeeded in the suit. Patanjali Sastri, J. (as he then was) held that the claimant would be entitled to recover the money back. The learned Judge held that a payment made in such a case could not be regarded as a voluntary one observing that some of the observations in *Kumma Kutty* v. *Neelakanta Nambudri*[3], might be said to be too broadly stated to be accepted as correct. As noticed in the earlier case, there is no

1. (1938) 1 M.L.J. 829.
2. (1940) 1 M.L.J. 340.
3. (1930) 59 M.L.J. 893 : I.L.R. 53 Mad. 943.

case which has taken the view that whenever a judgment-debtor makes a deposit under Order 21, rule 89, in order to enable him to have the sale set aside, he would be precluded from obtaining restitution in case the decree in execution of which the sale was made was set aside in appeal or otherwise. In *Krishnan Chettiar* v. *Nachimuthu Gounder*[1], an execution sale took place, while an application for scaling down the decree debt was pending. The debtor deposited the amount under Order 21, rule 89, Civil Procedure Code ; but nevertheless he pursued the application for scaling down the decree debt. It was found that the amount of decree as scaled down had been fully paid off even before the sale. The debtor thereupon applied to get back the amount deposited to set aside the sale. Patanjali Sastri, J., (as he then was) upheld the right of the debtor to get back the money, negativing the contention that the payment under Order 21, rule 89, was a voluntary one. This view was accepted and followed by Viswanatha Sastri, J., in *Ramayya Chetty* v. *Krishnayya Chetty*[2]. The learned Judge observed at page 373 :

> " It is not necessary that the judgment-debtor who deposits the money under Order 21, rule 89, Civil Procedure Code, should acknowledge the right of the decree-holder to draw out and retain the money deposited under all circumstances. Order 21, rule 89 does not require the judgment-debtor to forego his right of restitution in case the decree against which he has appealed is reversed after the Court-sale is set aside under that rule. The money was available to be drawn out by the decree-holder forthwith without any condition or obstacle. The pendency of an appeal from the decree was no bar to the execution of the decree or the sale of the judgment-debtor's property. Nor was it a bar to an application under Order 21, rule 89, Civil Procedure Code. It was not a condition prescribed by law that an applicant under Order 21, rule 89, Civil Procedure Code, should abandon his appeal from the decree just as he has to abandon an application under Order 21, rule 90, Civil Procedure Code."

We are in respectful agreement with the foregoing observations. Once it is held that a deposit under Order 21, rule 89 will not prejudice the person making the deposit from pursuing the proceedings instituted or to be instituted (other than one under rule 90), it follows that a statement that such proceedings are pending or contemplated cannot make it a conditional deposit. The learned Chief Justice who delivered the judgment of the Full Bench in *Krishna Ayyar* v. *Arunachalam Chettiar*[3] indicated his view that a mere reservation of right to impeach the validity of a sale in execution in other proceedings might not vitiate an application under Order 21, rule 89 (*vide* page 978). That decision was concerned with the question whether the debtor could pursue the petition under rule 90 after making a deposit under rule 89. The answer was in the negative. In C.R.P. No. 1391 of 1945, Kuppuswami Ayyar, J. held that where a deposit under Order 21, rule 89, Civil Procedure Code, was made stating that the decree was a collusive one and the deposit was subject to the rights of the depositor, in respect of which he was entitled to take certain steps, it was a conditional one, and an application under Order 21, rule 89, would not lie. That decision was based on the somewhat wide observations contained in *Kunnna Kutti* v. *Neelakantan Nambudri*[4]. Those observations were also relied on in *Edward Mathuram* v. *Abdul Latiff Sahib*[5], where Govinda Menon, J., held that the statement accompanying the deposit " without prejudice to his contentions in the appeal ", made it a conditional one ; but the learned Judge did not consider the two decisions referred to earlier, viz., *Pappu Reddiar* v. *Pichu Aiyar*[6], and *Raman Adiyoty* v. *Kannan Nombiar*[7]. With great respect, we are unable to share the opinion expressed in C.R.P. No. 1391 of 1945 and in *Edward Mathuram* v. *Abdul Latiff Sahib*[5], or to accept them as correctly decided. In our opinion, a deposit under Order 21, rule 89, Civil Procedure Code, should be unconditional in this sense, namely, that it should not contravene the terms of that rule or frustrate its object, *i.e.*, the deposit should not be accompanied by any request or statement to prevent the decree-holder and auction-purchaser from unconditionally drawing the respective amounts payable to them under the rule : the sale is deemed to have been conducted without any material irregularity and no application to set aside a sale under rule 90 could lie;

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1. (1942) 1 M.L.J. 500.
2. (1958) 1 An. W.R. 369.
3. (1935) 69 M.L.J. 349 : I.L.R. 58 Mad. 972 (F.B.).
4. (1930) 59 M.L.J. 893 : I.L.R. 53 Mad. 943.
5. (1949) 1 M.L.J. 447.
6. (1938) 1 M.L.J. 829.
7. (1940) 1 M.L.J. 340.

therefore there could be no reservation of any right to challenge the sale under that rule. This however cannot preclude the judgment-debtor from seeking to set aside a void sale under section 47, Civil Procedure Code. A void sale cannot be validated by a deposit which on the principle of the decision in *Pappu Reddiar* v. *Pichu Aiyar*[1], could only be held to be made under coercion. Nor would it disentitle him to relief under other provisions of law, *e.g.*, restitution. A statement in an affidavit accompanying the petition under Order 21, rule 89 that the deposit was made without prejudice to his rights in collateral proceedings (not being those under Order 21, rule 90) can only be a statement of fact or of certain legal rights; that cannot contravene the provisions of Order 21, rule 89, Civil Procedure Code. The conclusion reached by the learned District Judge is therefore correct.

The Civil Revision Petition fails and is dismissed with costs.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

The Provident Fund Society Ltd., Salem, through its Official Liquidator Sri V.N. Srinivasa Chakravarti and another .. *Applicant.**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), sections 10 (7) and 34—Profits of life insurance business—Mistake apparent on the face of the record of assessment—Record itself is a source of information leading to the discovery—Information need not be wholly extraneous to the record—Sections 34 and 35—Proceedings, under, if mutually exclusive—Sections 10 (7), 24 and rules 2 (a) and 2 (b) of the Schedule—Right to carry forward loss—Extent.

The actuarial deficiency disclosed by the second report for the period that ended on 31st December, 1945, was Rs. 90,851 and the deficiency at the end of 1946 as disclosed by the third report was Rs. 77,165. In computing the income of the life insurance business for the account year 1946 the Income-tax Officer instead of deducting Rs. 77,165 from Rs. 90,851, added both the sums and arrived at a deficiency. The mistake was discovered by the Income-tax Officer and proceedings under section 34 were commenced.

Held: If in a case the requirements of section 34 and section 35 are satisfied the Income-tax Officer can have recourse to either. That in such a case there is overlapping will not bar recourse to either sections at the choice of the assessing authority.

That the real deficiency or surplus in each of the relevant years was to be ascertained by subtraction and not addition of the deficiency for each of the two years could never be challenged. In such cases of obvious mistakes apparent on the face of the record of assessment, that record itself can be a source of information, if that information leads to a discovery or belief that there has been an escape of assessment or under assessment. The information within the meaning of section 34 of the Act need not be wholly extraneous to the record of the original assessment.

Section 24 of the Act is not one of the sections excepted by section 10 (7) of the Act and the statutory right to carry forward the loss could not be denied. What is computed as profits and losses of a life insurance business for purposes of assessment of income-tax may have no relation to the actual trading profits or losses as disclosed in the balance-sheet. The computation has to be made under rules 2 (*a*) or 2 (*b*) of the Schedule to the Act. In either case it is a notional profit or notional loss, computed for the purposes of assessment to income-tax. Under section 24 (3) of the Act the only loss that the assessee could carry forward was the loss as computed under the rules applicable to the life insurance business.

Cases referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act (XI of 1922), in R.A. Nos. 918 and 919 of 1955-56 (I.T.A. Nos. 1723 and 1724 of 1955-56, Assessment year 1947-48) on its file for decision on the following questions of law, *viz.*:—

" Whether the re-opening of assessments of 1947-48 and 1948-49 under section 34 is legal ? " and

" Whether the refusal to carry forward the unabsorbed loss of Rs. 86,738 and to set off the same against the profits in the year of assessments 1947-48 and 1948-49 is valid ? " respectively.

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1. (1938) 1 M.L.J. 829.

* C.R. Nos. 100 of 1956 and 89 of 1957.

14th December, 1960. (23rd Agrahayana, 1882, Saka).

R. Kesava Ayyangar and *K. Parasaran*, for Applicant.

S. Ranganathan for *C. S. Rama Rao Sahib*, Special Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan. J.—These two references, one under section 66 (1) and the other under section 66 (2) of the Income-tax Act arose out of proceedings of the assessment years 1947-48 and 1948-49, to assess the income of the assessee-company from its life insurance business which it carried on in the corresponding years of account 1946 and 1947.

As directed by section 10 (7) of the Act, the profits of the assessee-company had to be assessed each year either under rule 2 (*a*) or under rule 2 (*b*) of the Schedule to the Act, whichever was more favourable to Revenue.

The assessee-company commenced its business in 1935. The first actuarial report was for the period 24th May, 1935 to 14th March, 1941, and it showed a surplus of Rs. 5,131-5-1. The assessments for the years of account between 1935 and 1940 had necessarily to be only on the application of rule 2 (*a*). There was and there could have been no actuarial report for any antecedent period, without which there could be no recourse to rule 2 (*b*). The next inter-valuation period, for which an actuarial report was obtained was from 14th March, 1941 to 31st December, 1945. That showed a deficiency which when adjusted under rule 2 (*b*) to furnish the basis for assessment to income-tax, was ascertained as Rs. 86,708. The average annual deficiency for that period 1942 to 1945 worked out to Rs. 18,096. The second actuarial valuation report could furnish a basis for assessing the income of the assessee-company under rule 2 (*b*) only for 1945 and not any of the antecedent years. Subsequent to 1945 there were annual actuarial valuations for 1946 and 1947. The assessments for the years of account 1941 to 1944 were based on the first valuation report for the period that ended on 14th March, 1941. That showed a surplus of Rs. 5,131. The computation of the surplus under rule 2 (*b*) worked out to Rs. 7,280, and the annual average surplus was Rs. 1,238. Under rule 2 (*b*) therefore Rs. 1,238 was the computed profit for each of the years 1941 to 1944, and it was on that basis the assessments were completed for the relevant assessment years 1942-43 to 1945-46. That the subsequent actuarial valuation for the same period included in the inter valuation period 1941 to 1945 revealed a deficiency did not affect the validity or the finality of the assessments already completed for the assessment years 1942-43 to 1945-46. In other words, though there was a deficiency or loss in the years of account 1941 to 1944, which the actuarial report disclosed in 1946 the application of rule 2 (*b*) resulted in the company being taxed on an annual profit of Rs. 1,238 computed under that rule.

The assessment of the income for 1945 was on the basis of the second actuarial valuation report, and under rule 2 (*b*) the average of Rs. 18,096 was computed as the loss for 1945. That was more favourable to Revenue than the computation of the loss for that year under rule 2 (*a*).

When the income for the year 1946 had to be assessed in the assessment year 1947-48, the valuation report for 1946, the third valuation report was available The actuarial deficiency disclosed by the second report for the period that ended on 31st December, 1945, was Rs. 90,851, and the deficiency at the end of 1946 as disclosed by the third report was Rs. 77,165. Therefore there was an actuarial surplus of Rs. 13,688 for 1946. When the assessment was first completed in 194) the Income-tax Officer committed a mistake. Instead of deducting Rs. 77,165 from Rs. 90,851, which would have resulted in an actuarial surplus of Rs. 13,686 for 1946 he added both the sums and arrived at a deficiency of Rs. 1,68,016. The computation of the loss in that manner was more favourable to Revenue than a computation under rule 2 (*a*).

A similar mistake was committed when the income for 1947 was first assessed in 1949 for the assessment year 1948-49. The actuarial deficiency at the end of

1947, for which there was a separate actuarial valuation was Rs. 32,214. Instead of deducting this from Rs. 77,165 which would have shown an actuarial surplus of Rs. 44,951 for 1947, the Income-tax Officer added both the figures and computed an actuarial deficiency of Rs. 1,09,379. That again was more than the loss computed under rule 2 (*a*) in 1947.

The Income-tax Officer subsequently discovered the mistakes in the computation, and on 17th November, 1951, he issued notice to the Liquidator, who represented the assessee-company, which had meanwhile been ordered to be wound up, to show cause why the errors should not be rectified and the assessment revised under section 35 of the Act. The Liquidator objected. The Income-tax Officer dropped the idea of applying section 35 and he issued notices under section 34 of the Act on 29th December, 1951.

The assessee-company contended that the initiation of the proceedings under section 34 was not valid. The further contention of the assessee was that, even if the finality of the assessments could be validly reopened under section 34, the assessee was entitled to set off under section 24 the loss of Rs. 86,708, which represented the total deficiency at the end of 1945 computed under rule 2 (*b*) on the basis of the second actuarial report for the inter valuation period which ended on 31st December, 1945.

Both the contentions were negatived by the Income-tax Officer. The appeals the assessee successively filed to the Appellate Assistant Commissioner and the Tribunal failed. The Tribunal upheld the validity of the re-assessment under section 34. The Tribunal also upheld the contention of the Department, that all the loss the assessee was entitled to carry forward at the end of 1945 was Rs. 18,096, against Rs. 16,308, the profits for 1946 computed under rule 2 (*b*), leaving an unabsorbed loss of Rs. 1,788. Rs. 1,788 was deducted from Rs. 47,779, the profits for 1947 computed under rule 2 (*b*), and the assessee was taxed on the balance.

The questions that were referred to this Court were :

1. Whether the reopening of assessment of 1947-48 and 1948-49 under section 34 is legal ?

2. Whether the refusal to carry forward the unabsorbed loss of Rs. 86,708 and to set off the same against the profits in the year of assessments 1947-48 and 1948-49 is valid ?

The comparatively wide scope of section 34, with the use of the formula ' if for any reason ' was restricted when it was amended in 1939, requiring a correlation of the discovery of escape from assessment to definite information which had come into the possession of the Income-tax Officer. What section 34 (1) (*b*) as amended in 1948 required was that the Income-tax Officer should in consequence of information in his possession have reason to believe that the income had escaped assessment.

Section 35 permits rectification where the mistake is apparent on the face of the record of assessment. The learned counsel for the Department could not challenge the correctness of the plea of the assessee, that the original assessments completed in 1949 for both the assessment years under consideration now could have been rectified under section 35. The mistakes were apparent on the face of the assessment orders themselves. What should have been subtracted was added to ascertain the deficiency disclosed by the actuarial reports. It should be remembered that the Income-tax Officer first contemplated recourse to section 35 but dropped it as the assessee did not agree.

The further contention of the learned counsel for the assessee was that where rectification was permissible under section 35, recourse to section 34 was barred : they were mutually exclusive.

In *Commissioner of Income-tax, Bombay and Aden* v. *Khemchand Ramdas*[1], their Lordships of the Privy Council observed :

1. (1938) 2 M.L.J. 115 : L.R. 65 I.A. 236 : 6 I.T.R. 414 at 426 (P.C.).

"In their Lordships' opinion the provisions of the two sections (sections 34 and 35) are exhaustive, and prescribe the only circumstances in which and the only time in which such fresh assessments can be made and fresh notices of demand can be issued. In the present case it is a debatable question whether the circumstances were such as to bring it within the provisions of section 34. It is not necessary to determine that question inasmuch as, in their Lordships' opinion, the case clearly would have fallen within the provisions of section 35 had the Income-tax Officer exercised his powers under the section within one year from the date on which the earlier demand was served upon the respondents..............The Income-tax Officer took no further step, however until May, 1929, and by then he was hopelessly out of time whichever of the two sections was applicable."

Their Lordships of the Privy Council did not decide the question, whether in a given case section 34 and section 35 could be viewed as alternative remedies open to the Department, the choice being left to the Department, or whether they were mutually exclusive. In fact their Lordships had no occasion even to consider whether the two sections were mutually exclusive.

This passage in *Commissioner of Income-tax, Bombay and Aden* v. *Khemchand Ramdas*[1] was referred to by the Supreme Court in *Maharana Mills (Private) Ltd.* v.*Income-tax Officer*[2]. But there was no occasion then either for their Lordships of the Supreme Court to decide or even discuss whether section 34 and section 35 were mutually exclusive in their operation.

In *Commissioner of Income-tax, Bombay* v. *D.R. Naik*[3], Beaumont., C.J., observed :

"It is also suggested that this is really a mistake, which ought to have been remedied under section 35 ; but even if that be so, the fact, that a mistake might be remedied under section 35, is no reason why the assessment should not be altered under section 34, if the case falls within that section. I see no reason for supposing that sections 34 and 35 are mutually exclusive."

Section 34 that was considered in that case was as it stood before its amendment in 1939 which permitted the reopening of assessments under the wider formula " if for any reason ". That decision is not direct authority on the scope of sections 34 and 35 as they now stand.

The real contention of the learned counsel for the assessee that we have to consider is that neither the test of " definite information that had come into possession of the Income-tax Officer ", nor the requirement of " information in his possession " that is prescribed by the 1948 amendment of section 34 can be satisfied, unless the information is extraneous to the record of the original assessment which the Income-tax Officer seeks to reopen under section 34. Another form in which the same contention was put forward was that a mistake apparent on the face of the order of assessment itself, as in this case, could not constitute information within the meaning of section 34, and that what is already on record, especially, if it is a mistake readily discoverable by a mere scrutiny, cannot be information which has come into the possession of the Income-tax Officer, or information in his possession within the meaning of section 34.

The learned counsel for the assessee sought support for this contention in the observations of their Lordships of the Supreme Court in *Maharaj Kumar Kamal Singh* v. *Commissioner of Income-tax*[4]. Referring to *Raja Beony Kumar Sahas Roy* v. *Commissioner of Income-tax*[5], their Lordships pointed out that in that case it was held that information as to the true state or meaning of the law derived freshly from an external source of authoritative character was definite information within the meaning of section 34. Their Lordships proceeded :

"It appears that in construing the scope and effect of the provisions of section 34, the High Courts have had occasion to decide whether it would be open to the Income-tax Officer to take action under section 34 on the ground that he thinks that his original decision in making the order of assessment was wrong without any fresh information from an external source or whether the successor of the Income-tax Officer can act under section 34 on the ground that the order of assessment passed by his predecessor was erroneous, and divergent views have been expressed on this point.

1. (1938) 2 M.L.J. 115: L.R. 65 I.A. 236: 6 I.T.R. 414 (P.C.).
2. (1959) S.C.J. 1125 : 36 I.T.R. 350 at 358.
3. (1939) 7 I.T.R. 362 at 367-8.
4. (1959) 1 M.L.J. (S.C.) 92: (1959) 1 An. W.R. (S.C.) 92 : (1959) S.C.J. 230: 35 I.T.R. 1 at 14.
5. (1953) 24 I.T.R. 70 : A.I.R. 1954 Cal. 225.

Mr. Rajagopala Sastri, for the respondent, suggested that under the provisions of section 34 as amended in 1948, it would be open to the Income-tax Officer to act under the said section even if he merely changed his mind without any information from an external source and came to the conclusion that, in a particular case, he had erroneously allowed an assessee's income to escape assessment. We do not propose to express any opinion on this point in the present appeal."

We should like to emphasise even at the outset that we are not dealing with a case of a change of opinion on the part of the assessing authority, but with an error in computation obvious on the face of the order of assessment itself. That the real deficiency or surplus in each of the relevant years was to be ascertained by subtraction and not addition of the deficiency for each of the two years could never be challenged. Whether the discovery of such a mistake, which in its turn led to the further discovery of escape from assessment or under assessment, constitutes information within the meaning of section 34 (1) is what we have to decide in this case. We do not propose to cover any wider ground.

We are unable to accept the extreme proposition, that nothing that can be found in the record of the assessment, which itself would show escape of assessment or under assessment, can be viewed as information which led to the belief that there has been escape from assessment or under assessment. Suppose a mistake in the original order of assessment is not discovered by the Income-tax Officer himself on further scrutiny but it is brought to his notice by another assessee or even by a subordinate or a superior officer, that would appear to be information disclosed to the Income-tax Officer. If the mistake itself is not extraneous to the record and the informant gathered the information from the record, the immediate source of information to the Income-tax Officer in such circumstances is in one sense extraneous to the record. It is difficult to accept the position that, while what is seen by another in the record is "information " what is seen by the Income-tax Officer himself is not information to him. In the latter case he just informs himself. It will be information in his possession within the meaning of section 34. In such cases of obvious mistakes apparent on the face of the record of assessment, that record itself can be a source of information, if that information leads to a discovery or belief that there has been an escape of asessment or under assessment.

The real question is not whether section 34 and section 35 are mutually exclusive in their operation , but whether in a given case, the statutory requirements are satisfied. If in a given case the requirements of both section 34 and section 35 are satisfied, the Income-tax Officer can have recourse to either. That in such a case there is overlapping will not bar recourse to either section at the choice of the assessing authority.

So the real question is, whether the requirements of section 34, and in particular the requirement of information were statisfied in this case. We see no justification to accept the contention of the learned counsel for the assessee that to constitute information within the meaning of section 34, it must be wholly extraneous to the record of the original assessment. We hold that the mistake apparent on the face of the order of assessment itself constitutes information ; whether someone else gave that information to the Income-tax Officer or whether he informed himself is immaterial. We are further of opinion that in the circumstances of this case the availability of the powers vested in the Income-tax Officer by section 35 did not bar recourse to the jurisdiction vested in him by section 34. The initiation of proceedings under section 34 was, in our opinion valid.

The second question is, what is the quantum of the loss that the assessee-company could carry forward when its income for 1946 and 1947 had to be reassessed. Section 24 is not one of the sections excepted by section 10 (7) of the Act and the statutory right to carry forward the loss could not be and was never denied. It was the extent of the relief permissible under section 24 that was in controversy.

The profits or losses of an assessee have to be ascertained with reference to each year of his account. Before the profits of any year are ascertained the losses of the previous years have to be set off or deducted within the limits prescribed by

section 24. Did the assessee company sustain loss in the years that preceded 1946 and what was the extent of that loss have to be determined first.

In the case of the assessee the profits and losses in each of the years that preceded 1946 were computed and ascertained in the course of the assessment proceedings of the relevant assessment years. That computation was, and had to be, on the application of rule 2 (*a*) or rule 2 (*b*), at the discretion of the Department, the Department being given the right to choose the method of computation more favourable to Revenue. We have already pointed out that the assessments for each of the years of account 1941 to 1944 were based on the first actuarial report for the inter-valuation period that ended on 14th March, 1941. The factual position was as follows. In 1940 there was an assessed loss of Rs. 2,870, assessed under rule 2 (*a*), which the assessee was allowed to carry forward. The profits of 1941 were assessed again under rule 2 (*a*) (Rs. 1,726) which was more favourable than the assessment under rule 2 (*b*). That left an unabsorbed loss of Rs. 844, which was set off towards the assesseed profits of 1942. The profits of each of the years 1942, 1943 and 1944 were assessed under rule 2 (*b*), and it had necessarily to be same Rs. 1, 238, in each of those years, because that was the annual average of the actuarial surplus of the preceding inter-valuation period that had ended on 14th March, 1941, adjusted under rule 2 (*b*). There was no assessed loss to be carried forward in 1943, 1944, or 1945. When the income of 1945 had to be assessed, the second actuarial report furnished the basis of assessment and, as we have pointed out already, Rs. 18,096 was assessed as the loss of that year under rule 2 (*b*). That that was the correct computation of the loss for 1945 could not admit of any doubt. The assessee was not entitled to treat the entire deficiency disclosed by the second actuarial report for the period that ended on 31st December, 1945, as loss sustained in the year of account 1945. The deficiency adjusted under rule 2 (*b*) was Rs. 86,708, but only the annual average of Rs. 18,096 could be taken as loss for one year 1945, even as Rs. 1,238, the annual average of the surplus of the preceding period, was taken as the annual profits of each of the three years that preceded 1945.

What has to be borne in mind is that what is computed as profits and losses of a life insurance business for purposes of assessment of income-tax may have no relation to the actual trading profits of losses as disclosed in the balance sheet. The assessment had to be under rule 2 (*a*) or 2 (*b*). In either case it is a notional profit or notional loss, computed only for purposes of assessment to tax. But that is the only basis for assessment. The assessment of profits and losses for each of the years 1941 to 1944 was and necessarily had to be, with reference to the actuarial report of the period that preceded 1941, whatever were the actual trading profits as disclosed in the balance-sheets of those years. What happened in this case was that, while the actuarial report for the period 1941 to 1945 disclosed a deficiency, that could not be, and was not, the basis of assessment for any of the years 1941 to 1944. In was on a profit computed under rule 2 (*b*) that the assessee was liable to be assessed and was in fact assessed up to the end of 1944. That notional profit could not be converted into a loss, again a notional loss, on the basis of the actuarial report, which could not be the basis of the assessment for any of the accounting years to the end of 1944.

There was no loss that could be assessed as a loss under the special rules of computation applicable to the life insurance business, in 1943 or 1944. There was nothing to be carried forward as a loss when computing the assessable income of 1945. The loss for 1945 was correctly computed under rule 2 (*b*), and that loss of Rs. 18,096 alone was available to be carried forward in assessing the income of 1946. No doubt section 24 allowed the loss of more than one year to be carried forward; but in this case "factually" there were assessable profits in 1943 and 1944, which meant there was no loss to be carried forward to 1945 to be set off against the assessable income of that year.

The learned counsel for theDepartment pointed out that the assessment of profits and losses for each of the years that preceded 1946 had become final, and he relied

on section 24 (3) to bar the acceptance of the contention of the learned counsel for the assessee that the entire loss during the period that preceded 1946 should be allowed to be carried forward. It is really unnecessary to pronounce any concluded opinion of ours on the scope of the finality of the assessment of a loss communicated to an assessee under section 24 (3). We have said that though there was a computed deficiency of Rs. 86,708 at the end of the period that ended on 31st December, 1945, the loss that the assessee could carry forward was only the computed loss of 1945, Rs. 18,096.

We answer both the questions in the affirmative and against the assessee. The assessee will pay the costs of the Department in R.C. No. 100 of 1956. Counsel's fee Rs. 250.

V.S. —— *Reference answered against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

The Union of India represented by the General Manager, B.B. and C.I. Railway, Bombay Central and others .. *Appellants**

v.

B. L. N. Sitaramiah, a registered firm of cloth merchants by its partners, Godown street, G.T., Madras and others .. *Respondents.*

Limitation Act (IX of 1908), Article 30—Suit against a carrier for damages for injury to goods—Limitation—Starting point.

For purposes of a suit for compensation for damages to goods against a carrier the limitation will run under Article 30 of the Limitation Act from the date on which the consignee became aware of the damage. The date of repudiation of the claim by the carrier cannot be the starting point of imitation in such cases.

Rahim Sahib v. *Agent, S. I. Railway,* (1955) 1 M.L.J. 406 and *East Indian Railway and others* v. *Gopilal Sharma,* A.I.R. 1941 Cal. 304, differed.

Appeal against the Decree of the City Civil Court, Madras (Additional Judge) in A.S. No. 194 of 1955 preferred against the Decree of the City Civil Court, Madras (III Additional Judge) in O.S. No. 1886 of 1951.

S. S. Ramachandra Ayyar and *S. R. Kumaraswami,* for Appellants.

T. Krishnaji, for Respondent.

The Judgment of the Court was delivered by

Kailasam, J.—The plaintiffs filed this suit against the Union of India represented by General Managers of B.B. and C.I.,G.I.P. and Southern Railways for recovery of Rs. 1,453-13-6 as compensation for the damage done to six bales of cotton cloth consigned by the Surat Cotton Spinning and Weaving Mills, Ltd., to the plaintiffs. The Surat Cotton and Spinning Mills, Ltd. consigned six bales of cotton cloth on 25th August, 1950 to the plaintiffs. When the bales reached Madras they were found wet and thereupon delivery was taken on 21st September, 1950, in the presence of the Railway Inspector who made an endorsement to the effect that all the six bales were found damaged by water on all sides. Water had penetrated far into the bales and wettage could be felt on the gunny covering. Packing was gunny covering with brown paper packing inside. The plaintiffs took delivery on 21st September, 1950 in the expectation that the compensation of Rs. 1,453-13-6 which was fixed as damages to the goods would be paid by the railway authorities. There was correspondence between the plaintiffs and the railway company and by a letter, dated 26th December, 1950, the railway company rejected the claim for compensation on the ground that the bales were not packed with waterproof material and there was no misconduct on the part of the railway servants. The plaintiffs filed the suit on 19th December, 1951.

* S.A. No. 387 of 1958.

10th March, 1961.
(19th Phalguna, 1882, Saka.)

The trial Court came to the conclusion that the packing by the mills was as per the rules of the railway and that the plaintiffs are entitled to relief. It also found that the railway was guilty of recklessness and carelessness in performance of its duty. The trial Court held that the suit was within time under Articles 30 and 31 because the plaintiffs were entitled to the benefit of the period during which time the matter was in correspondence with the railway company.

On appeal, the Additional Judge, City Civil Court, confirmed the finding of the trial Court that the bales were in sound condition and the damage was caused owing to the carelessness and misconduct on the part of the railway servants. Against the decision of the Additional Judge, City Civil Court, Madras, the railway company has preferred this appeal.

When this appeal came up before Jagadisan, J., he found that the question is one of frequent occurrence and as a substantial question of law was involved and as there was conflict of judicial opinion, placed it before my Lord the Chief Justice for directions to post the case before a Division Bench and in pursuance of the order of my Lord the Chief Justice this case is posted before us.

Both the Courts have come to the conclusion that when the goods were despatched they were properly packed and the damage was due to the carelessness and misconduct on the part of the railway servants. We are in complete agreement with the findings of fact and the learned counsel for the railways did not attempt to dispute the finding. The only contention which the learned counsel raised was that the suit is barred by limitation.

He contended that the goods were in a damaged condition and open delivery was given by the Railway Inspector to the plaintiffs on 21st September, 1950 after noting the details of damage. The plaintiffs were therefore fully aware of the loss or injury to the goods on 21st September, 1950. The suit was filed on 19th December, 1951 and therefore excluding the time taken for notice the suit ought to have been filed on 21st November, 1951 and therefore it is out of time. The learned counsel for the railway contended that Article 30 provides for a suit against a carrier for compensation for losing or injuring the goods and the period of limitation is one year from the time when the loss or injury occurs. He submits that the loss to the goods occurred before 21st September, 1950 when the plaintiffs became aware of the injury to the goods and in any event the period of limitation will start from 21st September, 1950. We feel the contention is sound and has to be accepted.

The damaged bales were delivered to the plaintiffs on 21st September, 1950. Therefore, this case is not one of non-delivery or delay in delivery of goods so as to attract Article 31 of the Limitation Act but comes clearly under Article 30 which provides for compensation for loss or injury to goods. The learned counsel for the respondents contended that Article 30 has to be interpreted in the light of decisions interpreting Article 31 and that therefore the starting point of limitation will be the date of final intimation by the railway that the goods are lost. The learned counsel submitted that when period of limitation is computed from the date of final intimation by the railway authorities in the case of loss of goods, the same condition may be applied to ' injury to goods ' which also forms part of Article 30. We are unable to agree with this contention. Whether the word non-delivery in Article 31 will include loss or not, does not help the present discussion. In this case there is no question of non-delivery. The damaged goods were in fact delivered to the respondents. Article 30 is the Article that provides for injury to goods and as the defendant has taken delivery of the goods it will not amount to non-delivery and as such cannot be governed by Article 31.

The question is whether the period of limitation can be held to start from the date on which the railway company finally repudiates its claim as has been held in the case of Article 31. We feel that the decisions under Article 31 have no application in a case in which the goods were damaged and the damaged goods were taken delivery of by the consignee. The Article mentions that the time begins to run from the date when the loss or injury occurs. Reading this along with column 1

which mentions that the suit against a carrier for compensation for losing or injuring goods should be filed within one year, the injury referred to in column 3 can only refer to injury to goods mentioned in column 1. Therefore the period of limitation will commence from the date of injury to the goods. There may be cases in which the injury to the goods might have been caused on a particular date but neither the railway company nor the consignee would have been aware of the injury. The goods may be damaged in transit and by mistake sent to a wrong destination. In such cases the railway themselves may not know when actually the goods were injured and in answer to enquiries by the consignee the railway may be informing the consignee that the matter is under consideration. In some cases the railway may come to know that the goods were injured after considerable time and again may take some more time in informing the consignees. In such cases it cannot be said that the period of limitation would begin from the date when the goods were actually injured, for if it were so, if the railway company or the consignee comes to know of the damage more than one year after the actual damage to the goods a suit by the consignee will be barred by limitation and we are of opinion this result would not have been contemplated by the Legislature. In our view the limitation will begin to run under Article 30 only on the date on which the consignee was informed of the injury to the goods. In this case the consignee did take open delivery of the goods on 21st September, 1950 and therefore he was fully aware of the damage to the goods and the limitation would in any event start running from 21st September, 1950.

The learned counsel for the railway referred to the decision in *Rahim Sahib* v. *Agent, S. I. Railway*[1]. In that case the goods were received at Tiruppur Railway Station on 18th August, 1944, and on unloading it was found that some bundles were completely wet and other bundles loose. The Claims Inspector examined the goods and issued a certificate on 9th September, 1944 and damages were claimed on 9th January, 1945. The Railway Administration repudiated the claim on 22nd January, 1945. After some correspondence the final reply was sent by the Commercial Superintendent on 4th July, 1945 that they maintain the repudiation for reasons already stated in their letter of 22nd January, 1945. The suit was instituted on 4th July, 1946. Krishnaswamy Naidu, J., observes that the entire correspondence shows that the claim was made only for damage to the goods and consequent loss and not for non-delivery and Article 30 alone would therefore apply. Regarding the starting point of limitation His Lordship found that the liability arose as early as 22nd January, 1945, when the Railway Administration originally repudiated the claim and that the Administration's letter stating that the matter was under enquiry would not take away the effect of repudiation in Exhibit A-4 and that the final letter of repudiation of 4th July, 1945, cannot be relied on as the date on which the limitation would start to run. We respectfully agree with the learned Judge that the Article that is applicable in the case is Article 30. But we are unable to agree with the view of the learned Judge that the starting point of limitation will be the date on which the Railway Administration repudiated the consignees claim on 22nd January, 1945. In cases falling under Article 30, as observed by us already, the time will start to run from the date on which the consignee became aware of the injury to the goods.

The learned counsel for the appellants also referred to the decision in *East Indian Railway and others* v. *Gopilal Sharma*[2]. Henderson, J., held that the time does not run from the date of plaintiffs' knowledge and that there is ample authority for the proposition that the time begins to run from the date when the injury was actually caused and that the burden of proving when the injury was caused rests upon the carrier. Later he observed that the delivery of the goods took place on 6th August, and therefore there cannot be any doubt that the injury took place not later than this date. We respectfully agree with the learned Judge when he observes that the burden of proving when the injury was caused rests upon the carrier

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1. (1955) 1 M.L.J. 406. 2. A.I.R. 1941 Cal. 304.

but we would qualify the learned Judge's proposition that the time begins to run from the date when the injury was actually caused by holding that the time will begin to run from the date when the consignee became aware of the injury.

The next case cited by the learned counsel for the railways is the decision in *Union of India* v. *Gujerat Tobacco Co.*[1]. Their Lordships held that under Article 30 the onus to prove date of loss or injury mentioned in column 3 of the Article is on the railway concerned.

It is unnecessary to refer to the decisions of other High Courts referred to by the learned counsel for the railways. We hold that the suit that was filed on 19th December, 1951 is clearly barred by limitation under Article 30. The appeal is therefore allowed. As we have found the railway guilty of negligence we are not awarding costs. Each party will bear his own costs throughout.

R. M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Testamentary and Intestate Jurisdiction.)

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

Saradambal .. *Plaintiff**

v.

Seethalakshmi .. *Defendant.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *sections* 66 *to* 71—*Scope—Inherent power to order refund of Court-fee—Testamentary suit—Court-fee levied on plaint on application being converted into suit on* caveat *being entered—Subsequent withdrawal of contest by* caveator—*Application for refund of Court-fee levied on* caveat—*Competency—Schedule II, Article* 11 (*k*) *and Proviso—Construction—Interpretation of Statutes.*

An application for Probate was filed with a Court-fee of Rs. 25 as required by Article 11 (*k*) (i) of Schedule II to the Madras Court-fees and Suits Valuation Act, 1955. *Caveat* was entered and the proceeding was converted into a suit under Order 25 of the Original Side Rules of the Madras High Court ; consequently Court-fee was demanded and collected in accordance with the proviso to Article 11 (*k*), that is, to the extent of one half of the scale of fees prescribed by Article I, Schedule I, on the market value of the estate, less the fee already paid on the application. Subsequently the contest was withdrawn by the defendant and the suit was disposed of as uncontested. Plaintiff applied for refund of the additional Court-fee levied from him when the application was converted into a suit on the grounds, firstly that the Court had an inherent power to order a refund because the purpose for which the fee was collected was not achieved, the *caveat* having been withdrawn, and, secondly, that the proviso to Article 11 (*k*) would govern only clause (ii) and not clause (i) of Article 11 (*k*) and, therefore, no additional Court-fee ought to have been levied.

Held : (1) that section 69 of the Court-fees Act, 1955, would apply to a testamentary suit as well as to other suits filed on the Original Side of the High Court and in the face of the specific provision for refund, the inherent power of the Court could not be invoked or exercised to order refund of either the entire fee or half the fee paid on the plaint at the time when the original petition was converted into a suit. The fact that the claim in this case originally arose out of an application and not a suit did not make any difference. Nor would the fact that the *caveat* was withdrawn and the matter was disposed of as uncontested affect the question of the legality or otherwise of the levy of Court-fee in the first instance, giving rise to a refund except as provided in the specific sections of the Court-fees Act.

Chidambaram Chettiar, In re, (1934) 67 M.L.J. 321 : I.L.R. 57 Mad. 1028 and *Kappini Gounder*, In re, (1937) 2 M.L.J. 788, followed.

Tarachand v. *State*, A.I.R. 1955 Cal. 258, relied on.

J. C. Galstaun v. *Raja Janaki Nath Roy*, (1933) 38 C.W.N. 185, not followed.

Renganna v. *State of Madras*, (1949) 1 M.L.J. 160, explained and not followed.

(2) There is no warrant for holding that the proviso to Article 11 (*k*) of Schedule II to the Madras Court-fees and Suits Valuation Act, 1955, governs only clause (ii) of the Article.

A proviso is really in the nature of an exception to the main section and would normally govern the entire section or article in the absence of a special indication to show that it is limited to one part of it, and there is no such indication in the present instance.

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1. A.I.R. 1955 Cal. 448.

* T.O.S. No. 3 of 1959. (O.P. No. 6 of 1959). 9th September, 1960. (18th Bhadra, 1882, Saka).

Petition converted into a Testamentary Original Suit for allowing the plaintiff to prove the will in common form and for granting probate thereof to have effect throughout the whole of Union of India, to the Petitioner-Plaintiff.

K. N. Subramaniam, for Plaintiff.

P. R. Vasudeva Iyer, for Defendant.

The Court made the following

ORDER.—T.O.S. No. 3 of 1959 was disposed of by me after the withdrawal of contest by the defendant. The plaintiff in the suit has applied for refund of Court-fee paid on the plaint when the application was converted into a suit.

A fixed fee of Rs. 25 was paid when the proceeding was instituted as a original petition as required by Article 11(*k*) of Schedule II of the Madras Court-fees and Suits Valuation Act, 1955. When a *caveat* was entered the proceeding was converted into a suit under Order 25 of the Original Side Rules, and, thereupon Court-fee was demanded in accordance with the proviso to Article 11(*k*) of Schedule II of the Madras Court-fees Act and *ad valorem* Court-fee to the extent of one-half of the scale of fee prescribed in Article 1 of Schedule I of the Court-fees Act on the market value of the estate, less the fee already paid on the application, was collected. It is this fee that was levied and collected which is sought to be refunded by the present application.

Counsel for the plaintiff based his argument upon two grounds. First, he contended that despite the absence of any provision in the Court-fees Act, 1955, for refund of fee collected at the time when this proceeding was converted into a suit, the Court has an inherent power in suitable circumstances to order such refund. In support of his argument he contended that the purpose for which the fee was paid when the proceeding was converted into a suit was not achieved, having regard to the subsequent event that the defence was withdrawn and the probate was ordered to be issued. He also maintained that the question whether the fee actually levied at the time when the proceeding was converted into a suit was in excess of the requirements should be decided not only with reference to the state of affairs existing at the time when the fee was collected, but also with reference to subsequent events. The second argument of learned counsel was that the proviso to Article 11 (*k*) would only govern clause (i) and not clause (ii) of that Article. Clause (i) of the Article 11 (*k*) reads thus:

> " Application for probate or letters of administration to have effect throughout India. Proper fee, twenty-five rupees."

Clause (ii) reads thus:

> " Application for probate or letters of administration not falling under clause (i)—
>
> (1) if the value of the estate does not exceed Rs. 1,000 ; twelve annas.
>
> (2) if the value exceeds Rs. 1,000 ; five rupees."

Then follows the proviso in question which reads thus:

> " Provided that if a *caveat* is entered and the application is registered as a suit, one-half the scale of fee prescribed in Article 1 of Schedule I on the market value of the estate less the fee already paid on the application shall be levied."

It is apparent that there is a classification of applications for probate or letters of administration in this provison based on the question whether the probate sought to be issued will have effect throughout India or only within the State over which the High Court or the District Court has jurisdiction. In respect of the former class a heavier fixed fee is levied while in respect of the latter class a lower fee of either twelve annas or Rs. 5, depending upon the value of the estate, is levied. The condition upon which the higher fee indicated in the proviso can be levied does not depend upon either the value of the estate involved or upon the nature of the probate asked for. The point of distinction between the two classes turns solely upon whether the probate is to have effect throughout India or it should be restricted to the State in which the probate is issued, irrespective of its being issued by the High

Court or by a District Court. I am, therefore, unable to find any basis for the argument of the counsel that the proviso should be attached only to clause (2) of Article 11 (*k*) and not to the entire provison covered by the clause (*k*).

I have come to this conclusion for two reasons. Unless there are special indications to show that a proviso to a section is limited to one part of it, normally the proviso governs the entire section. Secondly, it is not necessary for the purpose of making a proviso applicable to the entire section to repeat it after each clause of that section. The proviso is really in the nature of an exception which takes a class of cases out of the operation of the main section. Having this in view, the proviso in question takes one category of applications for probate or letters of administration, namely, contested applications out of the ambit of the operation of clause (*k*) by providing *ad valorem fee* in the place of a fixed fee. Normally such a proviso should govern the entire section unless there are contrary indications. I find no such indications in the present instance. I therefore, reject this argument of learned counsel.

On the question of the inherent power of this Court to order refund of Court-fee levied, I must first of all notice the provisions of the Court-fees Act of 1955. Sections 66 to 71 deal with this point. Section 66 deals with refund consequent upon a plaint or memorandum of appeal being rejected on the ground of delay in its re-presentation, or where there is deficiency in Court-fee on such document and it is not made good within the time allowed by law or granted by the Court. Section 67 deals with the refund of Court-fee is in cases of remand. Section 68 provides for the refund of Court-fee where a Court reverses or modifies a former decision on the ground of mistake. It is section 69 which it is alleged deals with the problem I have to face in this case. It reads thus :

> "Whenever any suit is dismissed as settled out of Court before any evidence has been recorded on the merits of the claim, half the amount of all fees paid in respect of the claim or claims in the suit shall be ordered by the Court to be refunded to the parties by whom the same have been respectively paid."

The *Explanation* to this section is omitted as being not relevant for my present purpose.

Counsel for the plaintiff concedes that this section in terms will not apply to the present case because the suit was not dismissed as settled out of Court. On the other hand, the suit was decreed on the withdrawal of the contest. According to him, there is therefore, no provision in the Court-fees Act for refund of fee in a case like this. His argument is that where there is no specific provision for refund of fee in a particular case, the inherent power of the Court is attracted and the Court is free to order such refund. For another reason also section 69 would not apply to this case because the claim made is not for refund of half the fee collected at the time when the application was converted into a suit, but for the entirety of that fee.

This question of the inherent power of the Court to order refund of Court-fee has been considered by more than one Bench of this Court. In *Chidambaram Chettiar*, In re[1], a Bench of this Court had to consider the question of refund when an appeal was withdrawn and the Court-fee paid on the appeal memorandum was sought to be refunded. In dealing with this question the Bench observed :

> "In our opinion, the Court can order a refund (i) where the Court-fees Act applies, (ii) where there is an excess payment by a mistake or (iii) where, on account of the mistake of a Court, a party has been compelled to pay Court-fees either wholly or in part. Outside these cases we are not satisfied that we have authority to direct a refund."

In thus laying down the rule applicable to refund of Court-fees the Bench refused to follow the decision of the Calcutta High Court in *J. C. Galstaun* v. *Raja Janaki Nath Roy*[2]. If the rule laid down by this Bench is applied there can be no question in this case of any excess payment by mistake or by reason of any mistake of a Court;

1. (1934) 67 M.L.J. 321 : I.L.R. 57 Mad. 2. (1933) 38 C.W.N. 185.

This Bench decision was followed by another Bench of this Court in In re *Kappini Gownder*[1]. That was also a case of refund of Court-fee claimed on the withdrawal of an appeal as having been settled out of Court. The Bench held that such a claim did not fall within the purview of section 13, of the old Court-fees Act. The reason given by the Bench was that if a Court-fee was properly paid on the appeal memorandum it cannot be refunded because no Court has inherent power to do that which is expressly prohibited by Statute. This rule followed by two Bench decisions of this Court, has also been adopted by the Calcutta High Court and by the Lahore Court. In *Tarachand* v. *State*[2], the rule is thus stated :

> " Before any question of the exercise of inherent power can arise, it must be found that there has been a payment, not required by law or a payment in excess of what is enjoined by the charging statute and that there is no specific provision for a refund of the unwarranted payment which makes the exercise of the inherent power necessary, because the Court resorts to that power in aid of and by way of implementing its judicial decision that a party has made a payment not required by or in excess of what is required by law ".

To decide whether the payment made was in excess of what is required by law, learned counsel contends that not only the situation existing at the time when the fee was collected but also subsequent events must be taken into account. He cites a decision of Ramachandra Iyer, J., in support of his contention, *Renganna* v. *State of Madras*[3]. There the learned Judge had to consider a claim for refund arising in a suit originally filed in the Original Side of the High Court but transferred to the City Civil Court as a result of the enlargement of that Court's jurisdiction, when the suit was settled out of Court. The learned Judge held that in such a case the plaintiff would be entitled to refund of the Court-fee paid according to the scales provided in Rule 13-A of Order 2 of the High Court-fees Rules, 1933. After dealing with the relevant statutory provisions applicable to that case in support of his conclusion, the learned Judge also relied upon the principle that what is excess payment of Court-fee could be determined by reason of subsequent events like the settlement of a suit. He stated his conclusion thus :—

> "If originally the Court-fee collected is excessive, there is an undoubted power in Court to direct a refund of the excess. I can find no difference in principle between that case and a case where the original collection becomes excessive by reason of a subsequent event (like the settlement of the suit) which was contemplated and provided for by the rules themsleves."

This reasoning, apart from the interpretation of Order 2, rule 13-A of the High Court-fees Rules, 1933, was given as another ground for the conclusion of the learned Judge. In that sense the second line of reasoning relating to the collection of Court-fee originally justified by the statute, becoming excessive by reason of subsequent events indicated in the judgment of the learned Judge is really *obiter*. Even otherwise, the two Bench decisions noticed by me do not seem to have been cited before the learned Judge. In my opinion, these two bench decisions clearly lay down that subsequent events could not affect the question of the legality or otherwise of the levy of Court-fee at the first instance giving rise to a claim for refund except as provided in specific sections of the Court-fees Act. The rule is stated in precise terms in *Chidambaram Chettiar*, In re[4]. The learned Judge specifically ruled that outside the cases mentioned by them the Court had no authority to direct a refund. I am bound to follow that rule both as it is binding on me and as it also accords with my view of the matter.

This was not a case covered by a specific provision of any statute for refund of Court-fee. We are here dealing with a case of inherent power of the Court to order refund in cases not covered by the statute. In *Chidambaram Chettiar's Case*[4], also the claim for refund was not covered by any specific provision of the Court-fees Act. In my opinion, this rule which is binding upon me must be followed in preference to the view expressed by Ramachandra Iyer, J.

Learned counsel for the plaintiff referred me to a decision of the Bombay High Court in *Sundrabai* v. *The Collector of Belgaum*[5], and to the provisions of Order 25, of the Original Side Rules to contend that a testamentary suit would not fall into

1. (1937) 2 M.L.J. 788.
2. A.I.R. 1955 Cal. 258.
3. (1959) 1 M.L.J. 160.
4. (1934) 67 M.L.J. 321 : I.L.R. 57 Mad. 1028.
5. (1908) I.L.R. 33 Bom. 256.

the category of suits contemplated in section 69 of the Court-fees Act of 1955. He also referred me to rules 1, 62, 63 and 66 of Order 25 of the Original Side Rules to show that really after the withdrawal of a contest in a testamentary suit, it is treated as a non-contentious suit and the proviso to Article 11 (*k*) of Schedule II could not apply to such a suit. I agree readily that a testamentary suit stands on a different footing from regular suits on the file of the Original Side of this Court, but, I am not able to agree that a testamentary suit is taken out of the ambit of section 69 of the Madras Court-fees Act of 1955. The language used in that provision is, " whenever any suit is dismissed as settled out of Court before any evidence has been recorded on the merits of the claim ". In coming to this conclusion I am not unaware of the provisions of section 12 of the Court-fees Act. The *Explanation* to section 69 specifically provides that the phrase "merits of the claim" shall have the same meaning assigned to it in section 12 of the Court-fees Act. It is true that the claim in this case originally arose out of an application and not a suit. But, that, in my opinion, makes no difference because the enhanced Court-fee became payable only when the application was converted into a suit. At that stage, the merits of the claim of the plaintiff arose out of a plaint in a suit. In my opinion, section 69 applies to testamentary suits as well as to other suits filed in the Original Side of this Court. Since there is a specific provision for refund of the Court-fee on settlement of suits before hearing in section 69 of the Court-fees Act, I hold that the inherent power of this Court could not be invoked in this case to order refund of either the entire fee or half the fee paid on the plaint at the time when the Original Petition was converted into a suit. The claim for refund is therefore rejected. Taxed costs of the probate will come out of the estate. Advocate's fee Rs. 250.

P.R.N. ——— *Claim for refund rejected.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE VEERASWAMI AND MR. JUSTICE VENKATADRI.

Moolchand Kevelchand Daga .. *Appellant**

v.

Kissindoss Girdhardoss .. *Respondent.*

Arbitration Act (X of 1940), section 39 (2)—Bar of appeal—Scope of—' Second Appeal '—Meaning of.

Letters Patent (Madras), clauses 15 and 44—Judgment by a single Judge of the High Court setting aside an order of the lower Court under section 39 of the Arbitration Act—If appealable under clause 15—Clause 44 of the Letters Patent—Effect.

Arbitration Act (X of 1940), section 34—Applicability—Promissory note on settlement of disputes under a contract with an arbitration clause—Suit to enforce—If can be stayed.

An appeal under clause 15 of the Letters Patent (Madras) would normally lie from an order of a single Judge of the High Court provided the order is a judgment within the meaning of that clause. Clause 44 of the Letters Patent is in general terms and provides that the provisions of the Letter Patent are subject to the Legislative powers of the Governor-General. It only provides that in the exercise of such legislative powers all the provisions of the Letters Patent may in all respects be amended and altered. It is no doubt true that the term " second appeal " in section 39 (2) of the Arbitration Act is not used in the narrow and technical sense of a second appeal under section 100 of the Civil Procedure Code but means a further appeal, that is numerically a second appeal. But the further appeal contemplated is to the Court of a higher grade. Hence an appeal under clause 15 of the Letters Patent from one Judge of the High Court to two or more Judges of the same High Court cannot fall within the category of ' second appeal ' mentioned in section 39 (2) of the Arbitration Act.

Hurish Chunder Chowdhry v. *Kalisundari Debi*, (1883) L.R. 10 I.A. 4 : I.L.R. 9 Cal. 482 (P.C.), followed.

Chappan v. *Moidin Kutti*, (1899) 8 M.L.J. 231 : I.L.R. 22 Mad. 68 ; *Sabhapathi Chettiar* v. *Narayanaswami Chetty*, (1902) 11 M.L.J. 346 : I.L.R. 25 Mad. 555, referred.

There is thus nothing in section 39 (2) of the Arbitration Act, either in express terms or by necessary implication, which amends or alters Clause 15 of the Letters Patent restricting the right of appeal conferred thereunder.

* L.P.A. No. 96 of 1956. 27th February, 1961. (8th Phalguna, 1882, Saka).

Radhakrishnamurthy v. *Ethirajulu Chetty and Co.*, (1945) 1 M.L.J. 54 : I.L.R. (1945) Mad. 564 and *Co-operative Insurance Society* v. *Bapi Raju*, (1955) 2 M.L.J. 363 : I.L.R. (1956) Mad. 547, held not good law.

Hence an appeal under Clause 15 of the Letters Patent would lie from the judgment of a single Judge of the High Court setting aside an order of the City Civil Court under the provisions of section 39 of the Arbitration Act. Section 39 (2) of the Arbitration Act read with Clause 44 of the Letters Patent does not have the effect of barring such appeal.

Case-law referred and discussed.

By the Division Bench : A suit to enforce a promissory note taken in settlement of disputes under a contract with an arbitration clause cannot be stayed. Section 34 of the Arbitration Act has no application to such a case.

Appeal under clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice Ramaswami dated 23rd March, 1956 and made in A.A.O. No. 531 of 1954 preferred against the order of the City Civil Court, Madras (Principal Judge) in I.A. No. 676 of 1954 in O.S. No. 538 of 1954.

D. Ramaswami Iyengar and *V. Krishnaswami*, for Appellant.

A. K. Muthuswami Iyer and *S. Vaidyanathan*, for Respondent.

The appeal came on for hearing before a Division Bench (*Rajamannar, C.J.*, and *Basheer Ahmed Sayeed, J.*) when the following Order of Reference to a Full Bench was made by.

Rajamannar, C.J.† :—This is an appeal from the judgment of Ramaswami, J., in A.A.O. No. 531 of 1954. That appeal was preferred against the order made by the learned City Civil Judge, Madras, in I.A. No. 676 of 1954 in O.S. No. 538 of 1954. The application was made under section 34 of the Indian Arbitration Act for stay of the suit on the ground that the remedy of the plaintiff was to resort to arbitration. The learned City Civil Judge, however, dismissed the application and refused to grant stay. There was an appeal to this Court (C.M.A. No. 531 of 1954). The appeal itself was filed under section 39 (1) (*v*) of the Indian Arbitration Act. Ramaswami, J., allowed the appeal and set aside the order of the learned City Civil Judge, and granted the application for stay of the suit. This appeal is by the plaintiff from that order.

A preliminary objection was taken on behalf of the respondent before us that the appeal is incompetent, and reliance was placed on section 39(2) of the Indian Arbitration Act and the rulings of this Court in *Radhakrishnamurthy* v. *Ethirajulu Chetty & Co*[1], and *Co-operative Insurance Society* v. *Bapi Raju*[2]. Undoubtedly, the decision in *Radhakrishnamurthy* v. *Ethirajulu Chetty & Co*[1], directly supports, the preliminary objection. There, it was held by Sir Lionel Leach, C.J., and Shahabuddin, J., that an appeal under clause 15 of the Letters Patent against the judgment of a single Judge of the High Court setting aside an order of the City Civil Court under the provisions of section 39 of the Indian Arbitration Act, 1940, is barred by reason of sub-section (2) of the said section. The reasoning of this decision is contained in the following passage from the judgment of the learned Chief Justice :

> " It is true that clause 15 of the Letters Patent if it stood alone, would allow the appeal ; but clause 44 of the Letters Patent says that the provisions are subject *inter alia* to the legislative powers of the Governor-General in Legislative Council. The Indian Arbitration Act is an Act of the Central Legislature and the provisions of section 39 must prevail".

This ruling was followed by another Division Bench in *Co-operative Insurance Society* v. *Bapi Raju*[2]. The same view has been taken by the Bombay High Court in *Madhavdas Devidas* v. *Vithaldas Vasudevdas*[3], and by the Calcutta High Court in *R. Wright and Partner, Ltd.* v. *Governor-General in Council*[4]. On the other hand, a contrary view was taken by the Lahore High Court in *Hanuman Chamber of Commerce* v. *Jassa Ram*[5], and by the East Punjab High Court in *Mohindra Supply Co.* v. *Governor-General in Council*[6], the latter being the decision of a Full Bench.

† 9th November, 1959.

1. (1945) 1 M.L.J. 54 : I.L.R. (1945) Mad. 564.
2. (1955) 2 M.L.J. 363 : I.L.R. (1956) Mad. 547.
3. I.L.R. (1952) Bom. 570.
4. I.L.R. (1948) 2 Cal. 265.
5. A.I.R. (1948) Lah. 64.
6. A.I.R. 1954 Punj. 211 (F.B.).

It is true that clause 44 gives ample power to the Legislature to take away right of appeal conferred by clause 15 of the Letters Patent. But, before it can be held that such a right of appeal has been abrogated, there should be an express provision to that effect, or there should be some provision necessarily implying such abrogation. We find nothing *prima facie* in section 39 (2) of the Indian Arbitration Act which expressly takes away the right of appeal from one learned Judge to a Division Bench of this Court; nor can we find any language in section 39 (2), which of necessity would imply that such an appeal would be incompetent. We are not expressing any final opinion, as we are bound by the decisions in *Radhakrishnamurthy* v. *Ethirajulu Chetty and Co.*[1] and *Co-operative Insurance Society* v. *Bapi Raju*[2]. But, we are convinced that the decisions in *Radhakrishnamurthy* v. *Ethirajulu Chetty and Co.*[1], should be re-considered. The appeal will be posted before a Full Bench.

In pursuance of the order of reference the appeal came on for hearing before a Full Bench.

D. Ramaswami Ayyangar and *V. Krishnaswami*, for Appellant.

S. Vaidyanathan for *A. K. Muthuswami*, for Respondent.

The opinion of the Full Bench was delivered by

Rajamannar C.J.†—This appeal originally came before a Division Bench of this Court. A preliminary objection was taken on behalf of the respondent that the appeal was incompetent. The ruling of this Court in *Radhakrishnamurthy* v. *Ethirajulu Chetty and Co.*[1], directly supported the preliminary objection. But, after some argument, it was considered that that decision required reconsideration. Hence, this reference to a Full Bench.

The appeal purports to be filed under clause 15 of the Letters Patent against the Judgment of Ramaswami, J. in C.M.A. No. 531 of 1954. That appeal was against an order of the City Civil Court, dismissing an application filed by the respondent under section 34 of the Arbitration Act for stay of a suit (O.S. No. 538 of 1954) on the file of the City Civil Court. Section 39 (1) *inter alia* provides for an appeal from an order staying or refusing to stay legal proceedings where there is an arbitration agreement (clause (v)). The question is whether an appeal under the Letters Patent is maintainable against the order of Ramaswami, J. It was not contended before us on behalf of the respondent that the order of Ramaswami, J., was not a judgment within the meaning of clause 15 of the Letters Patent. *Prima facie*, therefore, this appeal would be competent. But the respondent's contention is that section 39 (2) of the Arbitration Act prohibits this appeal under the Letters Patent. That provision runs as follows :—

"No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

As mentioned above, the preliminary objection is supported by the decision in *Radhakrishnamurthy* v. *Ethirajulu Chetty and Co.*[1], the material passage from which has already been extracted in the order of reference. Clause 44 of the Letters Patent runs thus :—

"And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also the Governor-General under section 71 of the Government of India Act, 1915, and also of the Governor-General, in cases of emergency under section 72 of that Act and may be in all respects amended and altered thereby."

The learned Judges in *Radhakrishnamurthy* v. *Ethirajulu Chetty and Co.*[1], took the view that, as the Indian Arbitration Act was an Act of the Central Legislature, the provisions of section 39 should prevail, with the result that sub-section (2) of section 39 would take away the right of appeal conferred by clause 15 of the Letters

† 11th January, 1961.

1. (1945) 1 M.L.J. 54 : I.L.R. (1945) Mad. 564.
2. (1955) 2 M.L.J. 363 : I.L.R. (1956) Mad. 547.

Patent. This decision was followed by another Division Bench in *Co-operative Insurance Society* v. *Bapi Raju*[1]. Krishnaswami Nayudu, J. dealing with this point construed the second appeal contemplated under section 39 (2) as a further appeal and not a second appeal under section 100, Civil Procedure Code. The same view was taken by the Bombay High Court in *Madhavdas Devidas* v. *Vithaldas Vasudevdas*.[2] In this decision, unlike in the decisions of our Court, the question has been discussed at some length. Bavdekar, J., who delivered the Judgment on behalf of the Division Bench, referred to the sharp difference of opinion between our Court in *Radhakrishnamurthy* v. *Ethirajulu Chetty and Co*[3]., and the Lahore and East Punjab High Courts, which had taken a contrary view in *Hanuman Chamber of Commerce* v. *Jassa Ram*[4] and *Banwari Lal* v. *Hindu College, Delhi*[5]. It may be mentioned that the decision in *Banwari Lal* v. *Hindu College, Delhi*[5], was affirmed by a Full Bench of the East Punjab High Court in *Mohindra Supply Co.* v. *Governor-General in Council*[6]. After setting out the two possible interpretations which could be placed on the words " second appeal " the learned Judge refused to accept the interpretation, according to which the class of appeals contemplated would be appeals under section 100, Civil Procedure Code. " Second appeal " is a technical expression to denote an appeal under section 100, Civil Procdedure Code. Such an Appeal is only against a decree as defined in the Civil Procedure Code. An order under any of the provisions of the Arbitration Act would not be a decree. Therefore, the learned Judge held that it would be inappropriate to construe the expression " second appeal " as referring to the " second appeal " provided in and by section 100, Civil Procedure Code. The learned Judge therefore adopted the other interpretation. He observed at page 577 :—

> " When there is an appeal provided from an order in appeal from an order, then, that appeal would be numerically and in the dictionary meaning of the word "second" a second appeal."

His conclusion was as follows :—

> " Sub-section (2) of section 39 is obviously, therefore, intended to take away any right of appeal which may lie under any other enactment, and, in our view, therefore, the right of appeal, which was given by clause 15 of the Letters Patent, is by necessary implication taken away by sub-section (2) of section 39."

The decision of the Calcutta High Court in *R. Wright and Partner, Ltd.* v. *Governor-General in Council*[7], related to an order passed by a learned Judge of the High Court; but it was not one of the orders mentioned in section 39 (1) of the Arbitration Act. It was held that no appeal would lie from such an order under clause 15 of the Letters Patent, because the right of appeal given by the Letters Patent should be deemed to have been curtailed, modified and restricted by section 39 (1) of the Arbitration Act. The decision of this Court in *Radhakrishnamurthy* v. *Ethirajulu Chetty and Co.*[3], and the decision of the Bombay High Court in *Madhavdas Devidas* v. *Vithaldas Vasudevdas*[2], were followed by the learned Judges in coming to the conclusion that the right of appeal conferred by clause 15 of the Letters Patent had been curtailed and modified by section 39 of the Arbitration Act, because the provisions of clause 15 of the Letters Patent had to be taken subject to the legislative powers of the Governor-General in Legislative Council. As the order of the single learned Judge of the High Court was itself the original order, there was no scope for the application of section 39 (2) of the Arbitration Act.

A contrary view has been taken by the Lahore High Court and East Punjab High Court. In *Hanuman Chamber of Commerce* v. *Jassa Ram*[4], A Division Bench of the Lahore High Court (Abdul Rashid, C.J. and Mahajan, J.) held that section 39 (2) of the Arbitration Act did not take away the right of appeal conferred by clause 10 of the Letters Patent of the Lahore High Court (corresponding to clause 15 of the Madras Letters Patent) either expressly or by necessary implication. In the Judgment of Mahajan, J. as he then was who delivered the Judgment on behalf of the Court, express reference is made to the decision of our Court in *Radhakrishna-*

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1. I.L.R. (1956) Mad. 547.
2. I.L.R. (1952) Bom. 570.
3. (1945) 1 M.L.J. 54 : I.L.R. (1945) Mad. 564.
4. A.I.R. (1948) Lah. 64.
5. A.I.R. (1949) E.P. 165.
6. A.I.R. (1954) Punj. 211 (F.B.).
7. I.L.R. (1948) 2 Cal. 265.

murthy v. *Ethirajulu Chetty and Co.*[1], and this is what the learned Judge says in dissenting from that decision:

"With great respect, I might observe that, as the decision states no reasons in support of this view, it cannot be used as a precedent for a decision of similar cases when the point arises before another Court. I am, therefore, with due deference to the learned Judges who decided the above case, not prepared to follow it, as, in my opinion, it does not lay down sound law."

The learned Judge was inclined to construe the expression "second appeal" in section 39 (2) of the Arbitration Act as meaning appeals falling under section 100, Civil Procedure Code. He pointed out that the expression "second appeal" has seldom been used in respect of appeals which arise within the High Court and which are very commonly described as inter-Court appeals. In *Mohindra Supply Co.* v. *Governor-General in Council*[2], there is an elaborate discussion by a Full Bench of the Punjab High Court. Kapur, J., (as he then was) delivered the leading judgment. The learned Judge's reasoning and conclusion can be summed up in his own words:—

"I am therefore of the opinion that:

(1) Section 39, Arbitration Act, is a re-enactment of section 588 and second part of section 589 of the Code of 1882 and also of section 104 of the Code of 1908 minus the phrase added in that Code and a portion of section 106, and the interpretation which has been put on sections 588 and 589 of the Code would apply equally to section 39 of the Arbitration Act;

(2) In section 39 of the Arbitration Act as in section 588 of the Code of 1882 or section 104 of the Code of 1908, the word used is 'Order' and therefore this section cannot restrict an appeal which would fall under clause 10 of the Letters Patent of this Court which is against a Judgement;

(3) the mere fact that a saving clause was introduced in section 104 (1) of the Code of 190 and words similar to that saving clause do not find place in section 39 is no ground for interpreting ction 39 in a manner different from the interpretation which was put on section 588 of the Code of 1882;

(4) The Abtitration Act is not a special Act 'vis-a-vis' the Letters Patent; on the other hand, it is clause 10 which is a special Act as it provided for intra-Court appeals;

(5) the word 'second appeal' must be construed in its ordinary connotation as it is understood by lawyers;

(6) Even if it were to be used in the sense that it was used in cases decided under section 588, it applies only to appeals from an applellate order of a District Judge to the High Court, but it is not used in the sense of an appeal from one Judge of a High Court to two or more Judges of the same Court;

(7) There is no modification of clause 10 of the Letters Patent by section 39 of the Arbitration Act either expressly or by necessary intendment; and

(8) The fact that appeals were expressly provided to the King in Council presupposes that an appeal would lie from the Judgment of a single Judge to two or more Judges of that Court under clause 10 of the Letters Patent, otherwise the appeal to the King in Council would be only an illusory right. The same argument would apply to appeals to the Supreme Court."

No other decision of any Court directly bearing on the point was brought to our notice.

Having regard to this pronounced conflict of judicial opinion, we would discuss the question as if it were *res integra*. The order under appeal is a judgment within the meaning of clause 15 of the Letters Patent, and, therefore, *prima facie*, this appeal is competent under that clause. The contention that the appeal is incompetent is ultimately founded on clause 44 of the Letters Patent, read of course, with sub-section (2) of section 39. Clause 44 is in general terms and is of an omnibus nature. It does not specifically refer to any right of appeal conferred by any of the clauses of the Letters Patent. It decalres that the provisions of the Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council and the Governor-General in Council under section 71 of the Government of India Act, 1915, and of the Governor-General in cases of emergency under section 72 of that Act. What can be done in the exercise of such legislative power is also mentioned in clause 44 itself namely, that all the provisions of the Letters

1. (1945) 1 M.L.J. 54 : I.L.R. (1945) Mad. 564.

2. A.I.R. (1954) Punj. 211 (F.B.).

Patent may in all respects be amended and altered. Clause 15 is one of the provisions of the Letters Patent and it must be conceded that this clause may in all respects be amended and altered in exercise of the legislative powers of the Governor-General in Council. It is not pretended that clause 15 has been expressly amended and altered so as to take away the right of appeal conferred by it in certain cases arising under the Indian Arbitration Act. All that is contended is that, by necessary intendment, the clause should be deemed to have been amended and altered by section 39 (2) of the Arbitration Act, which is no doubt an Act passed by the Governor-General in Legislative Council. Before we can hold that such an important provision as clause 15 of the Letters Patent has been amended and altered by necessary implication, we should be satisfied beyond doubt that the implication is so compelling that to hold otherwise would be practically rendering a provision of an Act of the Central Legislature useless and inoperative. The question which falls for our decision, therefore, is whether section 39 (2) of the Arbitration Act compels us to hold that clause 15 of the Letters Patent must have been intended to be amended and altered. It is clear that section 39 of the Arbitration Act is a section generally dealing with appeals from orders passed under the Arbitration Act. " Court " is defined in section 2 of the Act thus :

" ' Court ' means a civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court."

It is obvious that, in the majority of cases, the ' Court ' would be one of the subordinate Courts in the country, though some of the orders might be passed by the High Court itself. All that we wish to stress upon is that section 39 covers not only appeals from orders passed by the High Court, but also appeals from orders passed by the other Courts. In some cases, the ' Court ' might be the Court of the Subordinate Judge. The " appellate Court " in certain cases may be the District Court though in other cases it may be the High Court. Under section 39 (1), the " appellate Court " is described as the Court authorised by law to hear appeals from original decrees of the Court passing the order. When a single learned Judge of this Court hears and disposes of an appeal preferred against one of the orders specified in section 39 (1) and passed by a subordinate Court, the learned Judge would constitute the Court authorised to hear appeals from the original decree of the Subordinate Court passing the order, namely, the High Court. There is no provision in the Code of Civil Procedure or in the Arbitration Act for an appeal from the order passed by a subordinate Court to a single learned Judge of this Court. The appeal lies to the High Court as such. There is nothing to prevent the Chief Justice of a High Court directing appeals preferred under section 39 (1) of the Arbitration Act to be disposed of by a Division Bench. The Appellate Side Rules may provide for certain of the appeals having regard to the value of the subject-matter involved, being heard by a single learned Judge and others by a Division Bench. Whather an appeal under section 39 (1) is heard by a single learned Judge or by more than one learned Judge, the matter is entirely one of internal arrangement of the High Court and is not provided by the Arbitration Act.

There has been a great controversy as to the meaning to be attached to the expression " second appeal " in section 39 (2) of the Arbitration Act. Some of the learned Judges were prepared to construe that expression as referring to appeals falling under section 100, Civil Procedure Code. It cannot be denied that, in common-parlance, the expression " second appeal " is used to describe appeals falling under that section. But, with great deference to the learned Judges who would construe that expression in section 39 (2) as referring to appeals under section 100, Civil Procedure Code, we are unable to agree with them, and for this reason. A Second Appeal under section 100, Civil Procedure Code, is only against a decree passed in appeal by any Court subordinate to a High Court. None of the orders mentioned in section 39 (1) of the Arbitration Act would be a decree within the meaning of the definition in the Civil Procedure Code. Therefore, even without any specific provision, no Second Appeal would lie to the High Court under section 100, Civil

Procedure Code. We are inclined to agree with those learned Judges who held that "second appeal" means a further appeal, that is, numerically second appeal.

At the same time, we are clearly of opinion that the second appeal contemplated is a further appeal to a Court of a higher grade. Section 39 (1) refers to an appeal from an original order to an appellate Court, which is a Court of a higher category. So, when there is a reference to a second appeal from an order passed in appeal under the section, that is, section 39 (1), the second appeal contemplated is a further appeal to a Court higher than the Court which passed the order in appeal. To illustrate: If the original order was passed by the Court of a Subordinate Judge and an appeal has been preferred under section 39 (1) of the Act to the District Judge, there will not be a further appeal to the High Court against the appellate order of the District Court. In our opinion, an appeal under clause 15 of the Letters Patent from one learned Judge of a High Court to two or more Judges of the same High Court cannot fall within the category of "second appeal" mentioned in section 39 (2) of the Act. This point is really covered by the high authority of the Judicial Committee of the Privy Council in the early case of *Hurrish Chunder Chowdry* v. *Kalisunderi Debi*[1]. It was held therein that a decision by a single Judge of the High Court appointed to dispose of matters relating to appeals to Her Majesty in Council, refusing to transmit for execution her order restoring a decree, is a judgment within the meaning of section 15 of the Letters Patent of 1865 and was appealable to a Division Bench of the High Court. It was contended before the Judicial Committee that secion 588 of the Civil Procedure Code of 1877 restricted appeals against orders to the list of orders enumerated therein. Their Lordships repelled this contention briefly, but clearly, thus:

"It only remains to observe that their Lordships do not think that section 588 of Act (X of 1877), which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the Full Court."

Some of the learned Judges appear to have treated this pronouncement of the Privy Council as in the nature of an *obiter dictum*. We think otherwise. It is a definite and unambiguous pronouncement of the scope of section 588 of Act X of 1877. We need only refer to the following observation of Subramania Ayyar, J., in *Chappan* v. *Mohidin Kutti*[2].

"This contention is, however, opposed to the ruling of the Judicial Committee in *Hurrish Chunder Chowdry* v. *Kalisundari Debi*[1], in which their Lordshisps laid down that that section does not apply to a case such as the present, where the appeal is from one of the Judges of the Court to the Full Court. I am unable to persuade myself, as I have already stated on a previous occasion that the observations of the Committee on the point are mere *obiter dicta*. The contention that section 588 modified clause 15 was not only distinctly raised, but was also strongly pressed by Counsel in the argument.

". . . . . Their Lordships had therefore to give a decision upon the soundness or unsoundness of the contention. That, it appears to me, they did in unmistakable terms."

The importance of the dictum of the Privy Council lies in the fact that section 39 is substantially a re-enactment of section 588 and second part of section 589 of the old Code of Civil Procedure and the corresponding section 104 of the Code of 1908 except for slight alteration.

Section 104 of the Code of 1908 has been construed by this Court as not restricting the right of appeal conferred by clause 15 of the Letters Patent. A Full Bench of this Court in *Paramasivam Pillai* v. *Ramaswami Chettiar*[3], held that section 104 of the Code did not control clause 15 of the Letters Patent. Anantakrishna Ayyar, J., after referring to the earlier decision of this Court in *Sabhapathi Chetti* v. *Narayanaswami Chetty*[4], *Muthuvaien* v. *Periasami Iyen*[5], and *Chappan* y. *Mohidin Kutti*[2], summed up the position in the following way:

"It was remarked that the prohibition contained in the Code of Civil Procedure related only to the entertainment of a further appeal by another Court of a higher grade in such cases, and that the

1. (1883) L.R. 10 I.A. 4 : I.L.R. 9 Cal. 482 P.C.).
2. (1899) 8 M.L.J. 231 : I.L.R. 22 Mad. 68 at p. 84.
3. (1933) 65 M.L.J. 222 : I.L.R. 56 Mad. 915 (F.B.).
4. (1902) 11 M.L. . 346 : I.L.R. 25 Mad. 555.
5. (1903) 13 M.L.J. 497.

provisions of the Letters Patent conferring a right of appeal from the judgment of one Judge of the High Court to the same Court were not in any way interfered with by the provisions of Code of Civil Procedure. That view has been accepted all along in this Court."

Learned Counsel for the respondent tried to whittle down the effect of the Full Bench ruling in *Paramasivan Pillai* v. *Ramaswami Chettiar*[1] by supporting it by reference to section 4 of the Code of Civil Procedure. However plausible may be the argument based on section 4, the fact remains that the actual decisions of the Full Bench in *Paramasivan Pillai* v. *Ramaswami Chettiar*[1], is not based on section 4, but is based on the principle that the appeal under clause 15 of the Letters Patent is not an appeal from a subordinate Court to a higher Court.

The saving provision in sub-section (2) of section 39 regarding the right of appeal to the Privy Council, and now, to the Supreme Court, appears to have given a little difficulty to some of the Judges. It is probably unnecessary; but having regard to the use of the general expression "second appeal " it was necessary in any event by way of abundant caution. The first part of section 39 (2) prohibits a second appeal from an order passed in appeal preferred under section 39 (1) of the Act. Where the High Court passes such an order on appeal, an appeal therefrom to the Supreme Court would numerically be a second appeal, and it may be open to argument that the prohibition of a second appeal might be understood as a restriction on the right to appeal to Supreme Court. This was not the intention of the Legislature, and that was made plain by the saving clause that nothing in the section shall affect or take away right to appeal to the Supreme Court. We may advert to an anomaly, if the contention of the respondent is accepted. If the judgment of a single learned Judge cannot be carried in appeal to a Division Bench then, the aggrieved party would not be entitled to prefer an appeal to the Supreme Court. Article 133 (3) of the Constitution specifically provides that no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court. On a consideration of all the aspects of the question, we have arrived at the conclusion that the expression " second appeal " in section 39 (2) of the Arbitration Act would not apply to an appeal under clause 15 of the Letters Patent from one Judge of the High Court to two or more Judges of the same Court. We are therefore of opinion that there is nothing in section 39 (2) of the Arbitration Act which compels us to hold that clause 15 of the Letters Patent has been amended and altered thereby and the right of appeal conferred by that clause restricted in any way. It follows that the decision in *Radhakrishnamurthy* v. *Ethirajulu Chetty and Co.*[2], cannot be accepted as good law. The preliminary objection is overruled. The appeal will be posted for hearing before a Division Bench in the usual course.

This appeal coming on for final hearing before the Division Bench (*Rajamannar*, *C.J.* and *Kailasam*, *J.*) the Order of the Court was delivered by

Rajamannar, *C.J.*†—This is an appeal against the judgment of Ramaswami, J. in C.M.A. No. 531 of 1954 which arose in the following circumstances. The appellant and the respondent were parties to certain transactions which consisted of contracts for purchase of art silk yarn. Disputes arose between them and the parties appear to have settled their disputes amicably. The terms of the settlement were that the respondent should pay to the appellant a sum of Rs. 4,000 in full quit of all claims in respect of 150 Japan Art silk yarn thirty cases purchased and sold to the respondent during the month of July, 1951. Out of this, an amount of Rs. 2,000 was paid by the respondent to the appellant by cheque on Indian Bank on 8th August, 1951. For the balance a promissory note was executed by the respondent in favour of the appellant. There was a letter which was passed by the appellant to the respondent, setting out [these facts and also containing the

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† 27th February, 1961.

1. (1933) 65 M.L.J. 222 : I.L.R. 56 Mad. 915 (F.B.).
2. (1945) 1 M.L.J. 54 : I.L.R. (1945) Mad. 564
3. (1933) I.L.R. 56 Mad. 915.

following statement. " We have not any claim on you in the art silk transactions up to date ". It was agreed that there would not be a demand of the amount due under the promissory note for a period of one year from the date of execution. The appellant filed a suit in the City Civil Court, Madras, O.S. No. 538 of 1954, for recovery of the amount due for principal and interest under the abovesaid promissory note.

In the plaint no doubt, there was only a bare averment in accordance with the recital in the promissory note that it had been executed for value received. The respondent filed a written statement, but also took out an application under section 34 of the Arbitration Act, praying that the Court should stay the suit, because the proper remedy of the appellant was to resort to the arbitration of the special panel of arbitrators constituted by the Madras Yarn Merchants' Association.

In the affidavit filed in support of this application, the respondent alleged that the parties were members of the Madras Yarn Merchants' Association and there was a clause in the contract between the parties, that all disputes in respect of contracts between members of the Association should be decided only by arbitration because of rule 10 (*a*) to (*c*) of the Madras Yarn Merchants' Association, Madras. That rule runs thus :—

" 10 (*a*) All disputes between members, brokers, members and non-members and *vice-versa,*' relating to or incidental to yarn trade, such as " Ready business ", " shipment ", " forward (*vaida*)' ' f.o.r.', ' ex-godown ', ' ex-mill', and any other contracts shall be decided by arbitration under these rules.

(*b*) Every written contract between members, non-member and a member, relating to yarn business, of any description shall contain the arbitration clause as provided for in rule 12 (*a*) herein, and no member shall enter into any written contract with a non-member without expressly including in the contract the said Arbitration Clause.

(*c*) The Clause shall cover all disputes including disputes arising out of non-payment of money due for the sale of yarn or such other dues which are incidental to the yarn trade."

Presumably, the contract between the parties contained the arbitration clause as provided under these rules. The contention on behalf of the respondent was that the subject-matter of the suit was really a claim for non-payment of money in respect of art silk yarn forward business. Therefore, it was covered by the arbitration agreement between the parties and the rule mentioned above. The application for stay was opposed by the appellant on the ground that the promissory note, on the foot of which a suit had been brought, was executed for an amount actually found due after mutual settlement between the parties and therefore there was no dispute or difference relating to the contract as such. The learned Judge of the City Civil Court dismissed the application. The learned Judge held that the suit was based only on a claim arising out of a promissory note which had remained unpaid and it did not in any way relate to the contract between the parties. On appeal to this Court in C.M.A. No. 531 of 1954, Ramaswami, J., set aside the order of the learned City Civil Judge and allowed the application for stay. This Letters Patent Appeal has been filed against this order of Ramaswami, J.

At the outset, there was a preliminary objection raised by the respondent to the maintainability of the appeal, which was filed under clause 15 of the Letters Patent. The question was referred to a Full Bench of this Court, which has since decided that the appeal was competent. It now comes up before us for final disposal on the merits.

We find it impossible to sustain the order of Ramaswami, J. The suit is based expressly on a promissory note. We shall assume that, for the purpose of disposing of this appeal, we can take into account the actual circumstances under which the promissory note came to be executed. Even so, all that can be said is that the promissory note was executed for an amount which was ageed to be paid by the respondent to the appellant to carry out the terms of the settlement arrived at between the two in respect of certain yarn transactions. The basis of the liability of the respondent is the compromise. The basis is not the primary liability of the respondent under the contracts. Learned counsel for the respondent was unable to draw our attention to any authority which lays down that, when there is an arbitration clause and a rule like rule 10 of the Madras Yarn Merchants' Association the parties, if they happen to be

members of the Association, are precluded from coming to an amicable settlement of disputes between them. It is really an extraordinary contention to accept, if advanced. Once therefore, there is no impediment in the way of parties having disputes in respect of contracts settling their disputes, we fail to see now the carrying out of the terms of the settlement can form the subject-matter of arbitration proceeding by virtue of the arbitration clause in the original contracts. Learned counsel for the respondent would have us to go this length, namely, that,even if the entire amount of Rs. 4,000 has been paid in cash, there may be still the possibility of having recourse to arbitration by the person receiving the said sum. Logically, it should be so. We are, however, not constrained to hold that this is the legal effect of the arbitration clause.

Learned counsel for the respondent cited to us certain decisions which have absolutely no bearing on the question which falls for decision in this appeal. The first is the decision of the House of Lords reported as a footnote[2] to the case of *Uttam Chand Saligram* v. *Jewa Mamooji*[1]. The facts of that case (*Chandanmull* v. *Donald Campbell & Co.*, (1916), unreported)[2] are extremely peculiar. Disputes having arisen under a contract of sale of jute, they were referred to the arbitration of the London Jute Association under the arbitration clause contained therein. The arbitrator determined the default of the sellers and also fixed the default prices, but failed to make an award directing one party to pay to the other party a specified sum. In pursuance of the basic principles of the award, there was a demand made by the appellants therein ; but the respondents did not make the payment. Apparently, the award could not straightaway be enforced in execution, because of the technical defect that the award did not direct the respondents to pay any specific sum of money to the appellants. Therefore, the appellants again resorted to a second arbitration alleging that there was a dispute, that is, there was no concensus of opinion as regards the actual amount to be paid by the respondents to the appellants. A second arbitrator then determined the amount and made a direction for the payment of a definite sum of money. It was contended that this second arbitration and award were illegal, because, there was no dispute between the parties. The House of Lords overruled the contention and held that the second award was valid because a dispute must be deemed to have existed as regards the actual sum of money payable by the respondents to the appellants. Lord Sumner thus disposed of the objections :

> "The question how much Mr. Chandanmul should pay was not submitted to Mr. Ritchie (the first arbitrator) ; as is usual in trade, he was only asked to fix default and the market value as the basis, if default, for a calculation for damages, The clerks were left to do the rest. Mr. Ritchie's award was valid, but, in view of the appellant's attitude towards it a second dispute arose and a second award was needed to resolve the first. That second award of Mr. Nevill was duly made."

Nothing like this has happened in the present case. The next decision cited by learned counsel for the respondent is that of the Calcutta High Court in *Uttam Chand Salingram* v. *Jewa Mamooji*[1]. He referred us to this case only because there is a reference in it to the House of Lords' case mentioned above. The decision itself is not very relevant. We are unable to follow how the decision in *Nandram* v. *Raghunath*[3], helps the the respondent in any way. All that was laid down in that case is that the existence of dispute or differences contemplated by an arbitration clause is an essential condition of and pre-requisite to the exercise of the jurisdiction by the arbitrator and the failure to perform the contract and to pay the amount claimed may lead to the inference of a dispute. The fallacy in applying the principle of this case to the case under consideration lies in overlooking that, in the present case, the plaintiff does not sue for the recovery of any sum payable under any contract. He only sues to recover the amount due under a promissory note which was executed in pursuance of a settlement between the parties.

The respondent contended that there would be a valid defence to the claim, because the contract was in the nature of a wagering contract which could not be enforced. We are not concerned with that defence so far as this appeal is concerned. All

1. (1919) 54 I.C. 285 (2).
2. The judgment is printed as an Appendix to 54 I.C. 285 (2) at pages 289 to 291.
3. A.I.R. 1954 Cal. 245.

that we are concerned with in this appeal is to find if under section 34 of the Arbitration Act the suit filed by the appellant on the promissory note should be stayed and the matter referred to arbitration. We are clearly of opinion that section 34 has no application to this case. The application for stay was misconceived. This appeal is allowed and the order of the learned City Civil Judge dismissing the application is restored with costs throughout.

R.M. ——— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYYER, MR. JUSTICE JAGADISAN AND MR. JUSTICE SRINIVASAN.

The Board of Revenue, Madras—The Chief Controlling Revenue Authority, Madras .. *Applicant**

v.

N. Narasimhan and another .. *Respondents.*

Stamp Act (II of 1899), *section* 5—*Scope—Distinct matters—What constitutes—Section* 2 (15)—*Instrument of partition—Deed of dissolution—When may be construed as instrument of partition.*

Stamp Act (II of 1899)—*Construction—Substance of the transaction—Applicability of the rule—Scope of—Right of parties to adopt the form of transaction to minimise stamp duty—Nature of document—Recitals govern and not the particular description.*

Where a document is a multi-purpose or multifarious document representing the purported settlement between the executants, of their mutual claims *inter se* arising out of several transactions by way of partnerships, joint acquisitions, joint ventures and other common activities, section 5 of the Stamp Act is necessarily attracted. Section 5 of the Act provides that any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount, of the duties with which separate instruments each comprising or relating to one of such matters, would be chargeable under the Act. The expression ' distinct matters ' connotes distinct transactions and even though there is identity of parties in respect of several transactions between them,if the transactions are distinct and separate but happen to be embodied in one document that document must be treated for the purpose of levy of stamp duty as comprising several documents though in form it is a single document. It is not necessary that the transactions embodied in a single document should be different and dissimilar.

The rights of quondam partners in a dissolved partnership may be adjusted and squared by various methods. A partner may retire from the firm by receiving consideration and release his rights in the partnership in favour of the other partner or partners who may choose to continue the business of the partnership . If the partnership business has ended in a loss a partner might retire from the partnership after making his contribution towards the loss sustained. The accounts of the partnership might be taken and settled and adjusted between the partners and as a result of such account taking one partner may owe another partner a particular sum of money. In the above instances any document embodying the transaction cannot certainly be called a deed of partition. Partners may agree to have the net assets of the partnership divided between them as a result of dissolution. In such instance of the transaction is embodied in writing it may operate as an instrument of partition, though it came about as a result of the dissolution of the partnership.

In the application of a taxing enactment to a subject the emphasis on the so-called substance of the transaction in antithesis to the form of it should be made with a good deal of caution.

There can be no legal impediment to a party selecting and adopting a particular form of transaction to minimise the expenses of stamp duty. The Revenue cannot say that the object of the transaction was to achieve a purpose not disclosed in the document and that therefore should be deemed to be that which it is not.

The true scope of the rule of substance prevailing over the form with reference to a document chargeable to stamp duty is that the recitals therein should not be lost sight of merely because the parties gave a particular description of the nature of document.

The document under reference is one portions of which may be construed as a deed of dissolution of partnership or deed of release and the other portion treated as mere memorandum of agreement between the parties. Under section 6 of the Act it will be chargeable only with the higher of such duties, *i.e.*, under Article 46-B. Under section 5 as comprising distinct matter stamp duty is leviable in respect of the dissolution of each of the businesses.

Reference made by the Secretary (Additional) to the Board of Revenue, Madras' in his statement of the case, dated 16th November, 1956, on a document submitted by

*Case Referred No. 119 of 1956. 7th April, 1961. (17th Chaitra, 1883, Saka).

N. Narasimham, the first Respondent herein to the Collector of Madras for valuation under the Stamp Act, for the decision of the High Court on the following question of law :—

" Whether the document, dated 5th September, 1954, is a deed of partition and conveyance and is liable to a stamp duty of Rs. 3,930 in addition to penalty."

The Government Pleader (*A. Aligiriswami*), for Applicant.

K. Krishnaswami Ayyangar, N. C. Raghavachari and *S. Sitarama Ayyar*, for Respondents 1 and 2.

The Judgment of the Court was delivered by

Jagadisan, J.—This is a reference by the Board of Revenue, Madras, the Chief Controlling Revenue Authority, under section 57 of the Indian Stamp Act raising the question of the chargeability of the proper stamp duty in respect of a document, dated 5th September, 1954, which came under the purview of the Revenue Authorities under the following circumstances.

Nidamurthi Narasimham and Surayya are divided brothers who were parties to a transaction embodied in writing and dated 5th September, 1954. Narasimham one of the executants of the said document presented it to the Collector of Madras for assessment and levy of the stamp duty payable for that document. The Collector impounded the document under section 33 of the Indian Stamp Act and called upon Narasimham to file an affidavit explaining the various items of transactions referred to in the document which, on the face of the document, looked obscure and cryptic. Narasimham filed an affidavit, dated 25th February, 1955, the contents of which were not really helpful in determiinng the chargeable stamp duty. The Collector classified the document as a deed of partition under Article 38 of Schedule 1-A of the Stamp Act and also as a conveyance under Article 19, Schedule 1-A of the Act and levied a stamp duty of Rs. 3,939 and a penalty of Rs. 70. The Board of Revenue, the Referring Authority, agreed with this view of the Collector. Thereupon the above reference to this Court has been made under section 57 of the Stamp Act.

The reference came on for hearing in the first instance before three learned Judges of this Court, Rajagopalan, Officiating Chief Justice, Ramaswami and Rajagopala Ayyangar, JJ. The learned Judges were of opinion that it was necessary to have further details regarding the particulars and items of transactions disclosed in the document before the reference can be answered and accordingly directed the Board of Revenue to submit a further and fuller statement of the case. The executants of the document were given opportunity to place before the Board of Revenue further evidence in regard to the nature of the items set out in the document. The further statement by the Board was directed to be submitted within three months from 18th November, 1957, the date of the order of this Court.

The Board has now filed a supplementary statement in the course of which it has observed as follows :—

" The parties to the document Nidamurthy Narasimham and his brother N. Surayya have not produced the relevant documents and accounts even though repeatedly called upon to do so. Mr. Narasimham, one of the executants, has stated that ' the accounts relating to the said documents were filed by me into the City Civil Court, Madras, in O.S. No. 1780 of 1956 on or about 10th August, 1956. Some of them were also exhibited in the trial of the suit. They will not be returned to me. Hence the Board may be requested to send for them from the City Civil Court '. Since the relevant accounts and documents were not produced before the Board and no further materials were available the Board regrets its inability to examine further the nature of each of the items set out in the memorandum."

The position now is just what it was on 18th November, 1957, when this Court wanted the Board of Revenue to submit a fuller statement of the case. The conduct of the executant of the document in abstaining from placing materials before the revenue authority to explain the true nature of the document, dated 5th September, 1954, is not commendable and it excites the suspicion of the Court that the parties are purposely evasive in the matter to avoid and escape the proper stamp duty payable in respect of the document. But this Court cannot refuse to answer the reference on

that ground as section 59 of the Indian Stamp Act provides that on a reference, 'the High Court shall decide the question raised thereby'. We have therefore heard the reference on the materials available on the record and we have reached the conclusion that the document in question cannot be treated either as a deed of partition or as an instrument of conveyance or as a composite document partaking of features of both the categories of partition and conveyance.

The document dated 5th September, 1954, is somewhat unique in character. It is not of the usual pattern setting out the names and descriptions of the parties to the document, giving a preamble as to the circumstances under which the document happens to be executed and containing an operative part reciting the operation of the document. The document begins with the words.

" To—N. Surayya ". Then follows a list of various items and as against each item a sum of rupees is mentioned. These sums are added and the total is given as Rs. 72,666. This amount of Rs. 72,666 is treated as credit in favour of N. Surayya and as being due from his brother Narasimham. Other items of debit against Surayya are next set out and these debit items are totalled up as amounting to Rs. 1,17,754. This amount is treated as due to Narasimham from Surayya. Then we find the following words "Excess due to N. N.-Rs. 45,088. This is apparently arrived at by deducting Rs. 73,666- from Rs. 1,17,754. Thereafter three items of credit in favour of Surayya amounting to Rs. 5,100 are set out and then we find the following words " Net excess due by N. Surayya to N. N.-Rs. 39,988. " This amount is arrived at by deducting Rs. 5,100 the last three items of credit in favour of Surayya from the amount of Rs. 45,088 already ascertained as due to Narasimhan. The document reads further as follows :

"*N.B.*—Shares of profits on Triplicane Cafe Rs. 875 to each of the two daughters of N. Surayya are payable by N. N. as on this date (September, 1954).

(1) Mortgage bond due from P. K. Manikka Gramani and others, common.

(2) Attipattu lands without plantain garden belong to N. N. exclusively.

(3) Suit by Alapati Kutumba Rao's wife for Rs. 1,000 and odd to be shared by both.

(4) Mortgage debt to Tyagaraja Iyer's daughter and daughter-in-law is joint. Interest payable to them to be paid from Triplicane Cafe income.

........................Etc...................."

In the affidavit dated 25th February, 1955, sworn to by Narasimham he averred that himself and his brother Surayya became divided in 1920, that they started doing joint business and acquiring properties jointly in the names of both in 1949 and continued these activities till the end of 1952 and that they agreed to share equally in all these ventures. In paragraph 4 of the affidavit he averred as follows :—

" In September, 1954, the accounts were looked into and after making all adjustments between us, the amounts due from one to the other were entered in the document now sought to be validated."

The deponent of the affidavit has next referred to the various items in the document and has given some information in regard thereto in as scanty a manner as possible perhaps observing caution lest he should be condemned by his own words and called upon to pay heavy stamp duty.

With these materials before them the Collector of Madras and the Referring Authority have treated the document as being a conveyance in respect of Rs. 73,505 chargeable to stamp duty under Article 19, Schedule 1-A of the Stamp Act. The amount of Rs. 73,505 is the total of items 3, 4, 5, 8, 10, 14 and 19 of the document. The Revenue Authorities have also treated the document as being a deed of partition in respect of other items disclosed in the document leviable with duty under Article 38, Schedule 1-A of the Act. The question for consideration before us is whether this view is correct.

It is obvious that the document is a multi-purpose or multifarious document representing the purported settlement between the executants of their mutual claims *inter se* arising out of several transactions by way of partnerships, joint acquisitions, joint ventures and other common activities. The applicability of section 5 of the

Indian Stamp Act is therefore necessarily attracted. Section 5 of the Stamp Act provides that any instrument comprising or relating to several distinct matters shall be chargeeable with the aggregate amount, of the duties with which separate instruments each comprising or relating to one of such matters, would be chargeable under the Act. The expression 'distinct matters' connotes distinct transactions and even though there is identity of parties in respect of several transactions between them, if the transactions are distinct and separate but happen to be embodied in one document that document must be treated for the purpose of levy of stamp duty as comprising several documents though in form it is a single document. It is not necessary for the applicability of section 5 of the Act that the categories of transactions embodied in a single document should be different and dissimilar.

In *Member, Board of Revenue* v. *Benthall*[1], the Supreme Court considered the applicability of section 5 of the Indian Stamp Act to a document of power of attorney which was executed by a person with several capacities. The Supreme Court held that such a document contained distinct matters within the meaning of the said expression under section 5 of the Act and was chargeable to stamp duty as a bundle of as many powers of attorney as the capacities of the executant. Venkatarama Ayyar, J., delivering the judgment of Court observed as follows at page 45:

> " In its popular sense, the expression 'distinct matters' would connote something different from distinct 'categories'. Two transactions might be of the same description, but all the same, they might be distinct. If *A* sells Black-acre to *X* and mortgages White-acre to *Y*, the transactions fell under different categories, and they are also distinct matters. But if *A* mortgages Black-acre to *X* and mortgages White-acre to *Y*, the two transactions fall under the same category, but they would certainly be distinct matters."

Again at page 46 the learned Judge observes :—

> " . . . . section 5 applies only when the instrument comprises more than one transaction, and it is immaterial for this purpose whether those transactions are of the same category or of different categories."

We are therefore of opinion that the document dated 5th Septembr, 1954, contains distinct matters within the meaning of the said expression in section 5 of the Act, and it is therefore chargeable to stamp duty with the aggregate amount of the duties which separate instruments each comprising or relating to one such matter would be chargeable under the Act.

The learned Government Pleader appearing for the Chief Controlling Revenue Authority frankly conceded, and in our judgment rightly, that no part of the document can be called a conveyance and that therefore Article 1-A of the Stamp Act was clearly inapplicable. We must mention that Schedule 1-A ot the Stamp Act inserted under the Madras amendments has been repealed by Madras Act (XIX of 1958) and alterations to duty, leviable by the Madras State, have been made in respect of the Article contained in the main Schedule 1 of the Act itself. Section 2 (10) of the Act defines a conveyance as including a conveyance on sale and every instrument by which property, whether moveable or immoveable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule 1. The document in question does not purport to transfer any property moveable or immoveable from Shri Narasimham to Surayya or from Surayya to Narasimham. Nor is there any evidence to show that an actual transfer *inter vivos* between them was agreed to or did take effect under that document.

The main contention on behalf of the Revenue urged by the learned Government Pleder was that the document is an instrument of partition and came within the purview of Article 38, Schedule 1-A of the Act now Article 45 of Schedule 1. Section 2 (15) of the Act defines instrument of partition as follows :—

> " 'Instrument of partition' means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue authority or any Civil Court and an award by an arbitrator directing a partition."

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1. (1956) 1 M.L.J. (S.C.) 43 : (1956) S.C.J. 56 : (1956) An. W.R. (S.C.) 43 : (1955) 2 S.C.R. 842.

The essential requisite of this section is that the instrument to be an instrument of partition must be a record of division of properties or an agreement to divide properties between co-owners. Can the document dated 5th September, 1954, be construed as a document of this description is the question to be considered. Admittedly the two divided brothers have been carrying on in partnership between themselves and in partnership with others several businesses. The business called Mylapore Cafe, Mylapore Silk House and Modern Textiles were partnerships of the two brothers. The business called Triplicane Cafe was partnership consisting of the brothers and some strangers. It also appears that the daughters of Surayya are partners of the said business. In the affidavit filed by Narasimham before the Revenue Authority he has admitted that himself and his brother have been acquiring properties jointly, agreeing to share equally, and it is possible to infer that with regard to these acquisitions the brothers were in the position of co-owners. But neither the document as such nor the explanatory affidavit filed by Narasimham can lead to the inference that the true intent and purpose of the document or a part thereof was to bring about a division of the common assets as co-owners or an agreement to divide such common assets.

The first item of credit in favour of Surayya is the sum of Rs. 5,414 under the head 'Groundnut shop'. The affidavit of Narasimham explains this entry as relating to the extra advances made by Surayya to the Groundnut shop. Item No. 7 in the document is a credit of Rs. 1,300 in favour of Surayya under the head 'Groundnut shop furniture'. The affidavit explains this figure as Surayya's share of the value of furniture of Groundnut shop closed in December, 1952. We cannot spell out from these two entries that the assets of the Groundnut shop which was apparently a partnership concern between the brothers were divided and that Surayya got for his share the sum of Rs. 5,414 plus Rs. 1,300. The most that can be gathered from these entries is that the business of the Groundnut shop was dissolved between the partners, Surayya and Narasimham and that on such dissolution and as a result of taking accounts Surayya left the partnership by receiving the two amounts. In regard to these entries the document can be treated only as an instrument of dissolution of partnership or as an instrument of release.

The third credit entry in the document is the sum of Rs. 15,000 under the head 'St. Thomas Mount'. The elucidation found in the affidavit of Narasimham in regard to this entry is as follows:—

"Rs. 15,000 representing Surayya's share in the house property in St. Thomas Mount jointly purchased by us and gifted away by us."

A house in St. Thomas Mount was jointly purchased by the two brothers and gifted to a third party. This much clearly appears from the above statement. Surayya is given credit for Rs. 15,000 representing his share in the said house property. It may be that Surayya paid the full value for the acquisition of the property and after having agreed to gift it along with the other sharer his brother was seeking reimbursement of the share of his brother payable by him for the acquisition. It may also be that the common property was gifted away by his brother, Narasimham perhaps taking advantage of the fact that the property stood in his name and that Surayya was claiming the value of the half share of the property lost to him by the act of his brother. In any event this sum of Rs. 15,000 only represented what was due to Surayya from his brother originating in a transaction of joint purchase of house property and cannot be taken to be a division of a common asset between them.

The 4th credit entry in the document is the sum of Rs. 30,000 under the head Mylapore Cafe. This is explained in the affidavit of Narasimham as the amount payable by him to Surayya for his giving up his share in the Mylapore Cafe dissolved in September, 1953. On the face of it this transaction can either be treated as a dissolution of partnership of the business of Mylapore Cafe or as a release by one of the partners Surayya of his rights in the said business in favour of Narasimham. There is no warrant for holding that the assets of Mylapore Cafe were divided and partitioned and that the document embodied such an arrangement of partition.

One of the items of credit in favour of Surayya is the sum of Rs. 8,220 which represents a transaction in respect of the business of Triplicane Cafe. It is explained in the affidavit that this sum of Rs. 8,220 was found due to Surayya in the accounts of Triplicane Cafe. The document itself states that the Triplicane Cafe is jointly owned by the brothers along with others in eight shares. There is nothing to show that there has been a dissolution of partnership in respect of the Triplicane Cafe business or that there was division of the assets of the partnership of the said business between the partners. We are unable to see how this credit entry can be treated as embodying a deed of partition in respect of the Triplicane Cafe business.

Another credit entry in favour of Surayya is the sum of Rs. 6,500 described as 'car expenses debited in excess'. The affidavit explains this amount of Rs. 6,500 as payable to Surayya in respect of the account of a car jointly maintained by both of them. All that can be said in respect of this entry is that in the course of joint maintenance of a car Narasimham owed his brother Surayya this sum of Rs. 6,500. It is impossible to treat this item as a division or an agreement to divide a common asset of the brothers.

The sum of Rs. 7,863 is debited to Surayya and shown as amount due to Narasimham from Surayya in respect of the Mylapore Silk House and Modern Textiles. Narasimham explains this debit against Surayya as being the amount found due by Surayya to him in respect of advance made on Surayya's account in respect of the Mylapore Silk House and Modern Textiles business which was discontinued in 1952. The entry taken along with the averment in the affidavit can only mean that Narasimham having paid some moneys on behalf of his brother Surayya in respect of that business was reimbursing himself for those amounts as a result of settlement of accounts between the parties. Such settlement of accounts if embodied in a document between the brothers can only amount to a dissolution of partnership and cannot amount to a division of assets of the partnership.

There is a credit entry in a sum of Rs. 3,600 in favour of Surayya in the document, the particulars whereof were given as follows :

> " Add value of engine to Salt manufacture given by N. Surayya."

From the affidavit of Narasimham it appears that he got an oil engine from Surayya and that for the value of it he was bound to recoup Surayya. There is nothing to suggest that there was any division of the value of the oil engine as a result of this transaction.

There is a debit of Rs. 21,208 against Surayya in the document and it is stated by Narasimham that this amount is due to him from his brother towards investment made by him on behalf of his brother. This appears to be a simple transaction by way of loan or accommodation between parties and this does not afford any the slightest basis for inferring a division of assets between them.

There are four items of debts in the document set out as follows :

> " Sudarsanam Iyengar Rs. 16,950; B. Narayana Murthy Rs. 11,305 : Hindu Office Rs. 10,600; Mr. Sastry Rs. 13,650; N. V. Narasamma Rs. 12,247."

These items are explained in the affidavit as follows :

> " The above amounts are due from Surayya in respect of borrowings made by me for himself and myself and undertaken to be discharged wholly by me as mentioned in item 5 to *N.B.* at the bottom of the first page."

Surayya having had the benefit of the borrowing made by Narasimham having undertaken to discharge those joint debts exclusively by himself, was bound to reimburse him for his share of the joint liability. The liability of Surayya is one by way of reimbursement to his brother for certain benefits, he had already enjoyed, and this cannot certainly amount to a division or partition.

It is unnecessary for us to go into further details of the various items set out in the document as in our opinion the learned Government Pleader failed to satisfy us that there was any entry therein which taken by itself or in the context of the affidavit of Narasimham can amount to a transaction operating as a deed of partition.

The learned Government Pleader submitted that a dissolution of partnership may result in a division of partnership assets and a document embodying such a division is an instrument of partition under section 2 (15) of the Stamp Act. In support of this contention he referred us to the decision reported in *The Secretary, Board of Revenue* v. *Alagappa Chettiar*[1]. In that case two firms at Nattanjan and Kayan in Burmah were jointly owned by five persons of whom three were undivided members of a Hindu family, the fourth was a distant and separated coparcener and the fifth a stranger. As a result of an award passed by arbitrators and embodied in a document bringing about a division between the partners the firm at *N* was allotted to the three undivided members as a group and the firm at *K* to the other two persons as a group. The Collector of Ramnad was of opinion that this document should be stamped as an instrument of partition. The reference to this Court was on the question of the true nature of this award as to whether it should be treated as a document of partition or as a deed of dissolution of partnership. Varadachariar, J., observed that if the document can be construed to be both as an instrument of partition and as a dissolution of partnership it will fall within the scope of section 6 of the Stamp Act and will attract the stamp duty payable for an instrument of partition as the duty chargeable in respect of a partition deed is higher than that of a deed of dissolution of partnership. The main contention urged on behalf of the parties to the award was that the partners cannot be said to be co-owners in respect of partnership assets and that therefore a division of the partnership assets cannot amount to a partition between co-owners. This contention was repelled. At page 177, Varadachariar, J., observed thus :—

> " Mr. Rajah Iyer next contended that the document is not an instrument of ' partition ' because it would not be proper to regard partners as co-owners of the partnership property. . . . there was a specific provision in section 253 of the Contract Act declaring the partners to be the 'joint owners' of the partnership property in the absence of any contract to the contrary. It will not therefore be correct to say that partners cannot be regarded as joint owners of the partnership property. It is true that the wording of section 14 of the Partnership Act of 1932 is slightly different but it does not appear to us that it was intended to indicate any difference in principle (Lindley on Partnership, Book III, Chapter V, S. 1). . . . . . The difficulty in applying the conception of co-ownership to indivudual items of partnership assets, is no reason against applying that description to the net assets of the partnership on the dossolution."

In the case cited above reference was made by the learned Judges to the decision of the Bombay High Court in *Choturam* v. *Ganesh.*[2] In the Bombay case there was a division of certain items of partnership assets between the partners without dissolving the partnership. A Bench of three Judges of the Bombay High Court held that the document amounted to an instrument of partition.

In the *Madras case*[1] above cited and in the *Bombay case*[2] there was actually in form and in substance a division of the partnership assets between the partners. Section 2(15) of the Indian Stamp Act directly came into play in regard to such instruments of division. The Madras decision[1] has been referred to by the Supreme Court in *Member, Board of Revenue* v. *A. P. Benthall*[3], with approval. The rights of quondam partners in a dissolved partnership may be adjusted and squared by various methods. A partner may retire from the firm by receiving consideration and release his rights in the partnership in favour of the other partner or partners who may choose to continue the business of the partnership. If the partnership business has ended in loss a partner might retire from the partnership after making his contribution towards the loss sustained. The accounts of the partnership might be taken and settled and adjusted between the partners and as a result of such account taking one partner may owe another partner a particular sum of money. Partners may also agree to have the *net* assets of the partnership divided between them as a result of dissolution. In the last instance if the transaction is embodied in writing it may operate as an instrument of partition, though it came about as a result of the dissolution of the partnership. But in the other instances referred to above any document embodying the transaction cannot certainly be called a deed of partition.

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1. (1937) 1 M.L.J. 174.
2. (1901) 3 Bom.L.R. 132.
3. (1956) 1 M.L.J. (S.C.) 43 : (1956) An.W.R. (S.C.) 43 : (1956) S.C.J. 56 : (1956) 2 S.C.R. 842.

In *Board of Revenue* v. *Murugesa Mudaliar*[1], a partnership business called Gudiyatham Lungi Company was carried on by five persons. The partnership disrupted and was dissolved on 12th April, 1949. On 23rd May, 1949 three quondam partners executed a document styled as a deed of release in favour of the other two partners. The question for consideration was whether the instrument was a conveyance under Article 19, Schedule I-A of the Act or a deed of dissolution of partnership under Article 39-B or a deed of release. This Court held that the document was only a deed of release. The learned Chief Justice delivering the judgment of the Bench observed thus at page 167:

> "It is not the case of any one that there was a division of the property by metes and bounds in accordance with the said shares. In such circumstances the document in and by which one co-owner purports to abandon or relinquish his claims to the share to which he would be entitled would be in the nature of a release within Article 44.
>
> In such a case there need be no conveyance as such by one of the co-owners in favour of the other co-owners. Each co-owner in theory is entitled to enjoy the entire property in part and in whole. It is not therefore necessary for one of the co-owners to convey his interest to the other co-owner. It is sufficient if he releases his interest. The result of such release would be the enlargement of the share of the other co-owner."

In *Board of Revenue* v. *Madalai Nadar & Co.*[2], two persons Rajakanni Nadar and Madalai Nadar were carrying on business in partnership under the name of T. M. Madalai Nadar & Co. On 12th May, 1953, a document purporting to be a deed of dissolution came into existence. There was a partition in the family of Rajakanni Nadar, one of the partners, and there was a dissolution of the partnership firm. After this dissolution the sons of Rajakanni Nadar either became partners or were admitted to the benefits of the partnership of Madalai Nadar & Co. It was recited in that deed of dissolution of partnership that Rajakanni Nadar shall have no interest whatsoever in any of the properties, good-will, stock and outstandings of the firm subsequent to 12th April, 1953. There was evidence in the case to show that Rajakanni Nadar had subscribed Rs. 32,000 towards his share of the capital of the business, and that long before the dissolution even in August, 1952, he had received this Rs. 32,000 by way of return of the capital contribution. The question which this Court had to consider was whether on these facts there was any conveyance involved in the transaction. It was held that the document was properly stamped as a deed of dissolution chargeable under Article 39-B of Schedule I-A of the Stamp Act. Rajagopala Ayyangar, J., delivering the judgment of the Bench observed thus at page 90:

> "We asked the learned counsel for the State as to whether, if a deed of dissolution provided for accounts being taken as between the partners, he would contend that the sum which was ultimately payable or paid by one to the other could be treated to be a conveyance for that sum, in addition to the deed being a deed of dissolution. The Government Pleader stated that that would not be his contention. We consider the present case *a fortiori*. Here the payment of Rs. 32,000 was made not under the deed but during the time when the partnership was *in esse*. There were therefore, no elements to render this deed one of conveyance."

In the present case the terms of the document do not indicate that there was any division of the assets of any of the several partnership businesses referred to therein. Though there has been a dissolution of some of the partnership businesses carried on by the two brothers, the arrangement that emerged in consequence of the dissolution was only to make one party liable to the other for a particular sum of money. It is inconceivable that such a transaction can be called a deed of partition and chargeable to stamp duty as such.

The learned Government Pleader on behalf of the Revenue referred us to the decision, *Reference under Stamp Act section 46*[3], and contended that the substance of the transaction should not be missed or lost by the outer cover or form of a particular transaction, and that the stamp duty should be levied on an instrument after ascertaining its true scope and character. In that case the mother died leaving property to two daughters who enjoyed it jointly. One of the daughters

1. (1955) 2 M.L.J. 166 : I.L.R. (1955) Mad. 1133 (F.B.).
2. (1958) 1 M.L.J. 88.
3. I.L.R. 12 Mad. 198.

died and her husband quarrelled with the surviving daughter about the property. This quarrel was settled between them by a division of the property between the surviving daughter and deceased daughter's husband as if they were co-owners of the property. The division was evidenced by two documents, which purported to be deeds of relinquishment of right. This Court held that although the documents were styled as releases they were really instruments of partition. At page 201 the learned Judges observed thus :

"The parties purport to be co-owners of the property and in that capacity agree to divide the property in severalty.

This arrangement falls within the definition of instrument of partition in clause (11), section 3 of the Stamp Act."

We do not think that the decision cited above can apply to the facts of the present case where the parties to the instrument did not purport to divide any property between themselves as co-owners.

In the application of a taxing enactment to a subject the emphasis on the so-called substance of the transaction in antithesis to the form of it should be made with a good deal of a caution. In *Bank of Chettinad, Ltd.* v. *Commissioner of Income-tax*[1] Sir Lancelot Sanderson delivering the Judgment of the Board observed thus :

" Their Lordships think it necessary once more to protest against the suggestion that in Revenue cases ' the substance of the matter ' may be regarded as distinguished from the strict legal position. In *Inland Revenue Commissioners* v. *Duke of Westminster*[2], disapproval of this doctrine was expressed in the opinions of Lord Tomlin and Lord Russel of Killowen. A passage from the opinion of Lord Russel of Killowen at page 24 may usefully be cited. It is as follows :—I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case."

There can be no legal impediment to a party selecting and adopting a particular form of transaction to minimise the expenses of stamp duty. The Revenue cannot say that the object of the transaction was to achieve a purpose not disclosed in the document and that therefore the document should be deemed to be that which it is not. In the words of Viscount Sumner in *Lovene* v. *I. R.*[3] :

" It is trite law that His Majesty's subjects are free if they can, to make their own arrangements, so that their cases may fall outside the scope of the taxing Act. They incur no legal penalties, and, strictly speaking, no moral censure, if having considered the lines drawn by the legislature of the imposition of taxes, they make it their business to walk outside them."

The true scope of the rule of substance prevailing over the form with reference to a document chargeable to stamp duty is that the recitals therein should not be lost sight of merely because the parties gave a particular description of the nature of the document.

In our judgment there is no basis for holding that the document is a deed of partition. It is a composite document portions of which may be construed as deed of dissolution of partnership, or deed of release and the other portion treated as mere memorandum of agreement between the parties. A deed of dissolution of partnership is chargeable to a duty of Rs. 20 while a deed of release is chargeable only to a duty of Rs. 15—*vide* Article 46-B and Article 55-A of Schedule I. Under section 6 of the Stamp Act if an instrument is so framed as to come within two or more of the descriptions in Schedule I where the duties chargeable thereunder are different, it will be chargeable only with the higher of such duties. We have therefore to hold that parts of the document have to be levied with stamp duty under Article 46-B. We have already held that the document falls within the ambit of section 5 as it comprises distinct matters. The document indicates that there has been a dissolution of three partnerships: (i) groundnut shop, (ii) the Mylapore Cafe and (iii) the Mylapore Silk House and Modern Textiles. Accordingly a stamp duty of Rs. 20 in respect of the dissolution of each of such businesses is chargeable.

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1. (1940) 2 M.L.J. 851: L.R. 67 I.A. 394: (1940) I.T.R. 522 at 526 (P.C.).
2. L.R. (1936) A.C. 1.
3. 13 T.C. 486, 501 (H.L.).

In addition as a part of the document amounts to a memorandum of agreement between the executants a stamp duty of Re. 1-50 nP. is chargeable under Article V-C.

The reference is answered accordingly.

V.S. ——— *Reference answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

R. G. Jacob .. *Appellant* (*Accused*).*

Penal Code (*XLV of* 1860), *section* 165—*Charge of receiving illegal gratification—Accused an administrative subordinate of the Superior Officer but matter in question not belonging to accused's sphere of duties—Effect.*

It is not necessary that the accused (Assistant Controller of Imports and Exports) must be a subordinate of the Superior Officer (Chief Controller in respect of the matter in question, in the sense that the matter must belong to the sphere of duties which is common to both the subordinate and superior officers. It is enough, if the accused is a general administrative subordinate to the Chief Controller to come within the pale of clause (2) of section 165, Indian Penal Code. Had the Legislature intended a restricted meaning, there is no reason why words to that effect should not have been used in the section.

Upon the evidence and probabilities, it must have been the appellant who suggested illegal gratification and the form of it. Consequently the trap designed in this case does not fall within the mischief of the prohibited category, repeatedly condemned in several decisions.

Appeal against the Judgment of the Court of the Special Judge, Madras, in Calendar Case No. 2 of the Calendar for 1959.

S. Mohankumaramangalam, G. K. Damodara Rao and *S. Krishnamurti*, for Appellant.

The Public Prosecutor, for State.

The Court delivered the following

JUDGMENT.—The appellant (R. G. Jacob) was an Assistant Controller of Imports and Exports in the Office of the Joint Chief Controller of Imports and Exports, Madras. In respect of a certain incident, charges were framed against him under section 161, Indian Penal Code, section 5 (1) (*d*) read with section 5 (2) of Central Act (II of 1947) and section 165, Indian Penal Code. The learned Special Judge, Madras, acquitted him of the charges under section 161, Indian Penal Code and 5 (1) (*d*) read with section 5 (2) of Act (II of 1947): but convicted him under section 165, Indian Penal Code alone, and sentenced him to undergo rigorous imprisonment for one year. The facts of the particular incident which gave rise to the prosecution are as follow :

One K. R. Naidu (P.W. 8), a merchant in provisions, applied on 21st January, 1958 to the Joint Chief Controller of Imports and Exports for a licence for export of chillies (Ex. P-1). The chief witness in this case, Arumugham (P.W. 1), whose antecedents I shall refer to later, had an authorisation from P.W. 8 (Ex. P-2) with regard to this matter. The application of P. W. 8 was rejected (Ex. P-4), and the question mooted was an appeal to the Joint Chief Controller who had powers to reverse the decision. It is alleged that in this connection P.W. 1 met the accused and solicited his help in getting a permit. At a later meeting, the accused divulged that an appeal had to be made for reversing the earlier decision, and that if he (accused) was given a bribe of two bags of cement and Rs. 50, the accused would help P.W. 1 and P.W. 8 to obtain the permit. The accused is supposed to have handed over a chit (Ex. P-5) to P.W. 1 containing his house address, as P.W. 1 was ignorant where exactly the appellant lived.

According to the prosecution evidence, P.W. 1 immediately established contact with the Deputy Superintendent of Special Establishment (P.W. 9) whom he

* Crl. Appeal No. 933 of 1959.

14th December, 1960.
(23rd Agrahayana, 1882, Saka).

knew earlier and divulged the facts to that Officer. As arranged by that Officer, a trap was set, and P.W. 1 actually succeeded in delivering the cement bags (which contained cards of identification put into them previously) and currency notes for Rs. 50(the numbers of which were previously noted by the police) to the appellant, in pursuance of the arrangement to give illegal gratification. At that moment, the Deputy Superintendent of Police and two mahazar witnesses (P.Ws. 2 and 3) practically raided the house of the accused, and recovered both the cement bags and currency notes from an almirah upstairs. The main question of fact, upon the evidence and probabilities, is whether this incident should be accepted as true and, if so, whether any offence is established upon the testimony.

I must immediately refer to the defence of the accused, for that largely relates to the merits. According to the appellant, though it is true that the cement bags and the currency notes were recovered from his house by the police, there was no incident of illegal gratification having been furnished to him by P.W. 1. On the contrary, all that happened was that P.W. 1 placed these objects in the house of the appellant, apparently temporarily and as his own possessions, and then called in the Deputy Superintendent of Police and the mahazar witnesses, as though the appellant had succumbed to the trap set. Naturally, this defence would depend, to a considerable extent, upon the question whether the currency notes were recovered, as the prosecution alleges, from the upstairs almirah of the appellant. If they were so recovered, the appellant could hardly pretend that the currency notes and the cement bags were articles temporarily kept by P.W. 1 in the house, without the accused taking charge of them as articles of illegal gratification. Upon this aspect, several arguments have been offered by learned counsel for the appellant, Sri Kumaramangalam. It is pointed out that P.W. 1 is a man of very doubtful, even shady antecedents. The Deputy Superintendent (P.W. 9) concedes this, and admits that P.W. 1 was not merely convicted under section 420, Indian Penal Code, in the Court of Additional First-class Magistrate, Kulitalai, but also that P.W. 1 had been convicted in 1957 in Madras in S.C. No. 28 of 1958 for offences of forgery and cheating (sections 420 and 468, Indian Penal Code). It is urged that the Deputy Superintendent of Police (P.W. 9) claims knowledge of P.W. 1 from sometime prior to this incident, and hence that P.W. 1 was practically a police informant. It is further urged that, according to a communication received from the Government of India, the integrity of P.W. 1 in relation to certain permits that he sought to obtain was gravely under question, and P.W. 1 himself was reported to be then underground : the suggestion is that P.W. 1, in those circumstances, could hardly have gone openly to the Office of the Joint Chief Controller, or held any parleys with the appellant. These arguments have some force ; but they do not detract in any manner from the truth of the actual offence. It is clear enough that P.W. 1 is not a person of savoury repute. It is also clear that the Deputy Superintendent (P.W. 9) was perfectly aware of this, but that does not imply that P.W. 9 is speaking any falsehood when he states that, on P.W. 1 divulging the facts to him, he (P.W. 9) set this trap for the appellant. As regards the communication from the Government of India, there is no clear evidence that the appellant was aware of this, or that even P.W. 1 was aware of it to the extent of inhibiting him from proceeding to the Office of the Joint Chief Controller. It is further true that the local mahazar witnesses have not been examined, but only P.Ws. 2 and 3 who accompanied the Deputy Superintendent. But there are no grounds to distrust or reject their testimony. In brief, the actual incident appears to be fully established.

Nor can it be seriously suggested that the defence of the appellant is likely to be true. We have the chit (Ex. P-5) in the handwriting of the appellant, though he chose to deny it, delivered to P.W. 1 and containing his home address. The evidence is uniformly to the effect that the previously marked currency notes were recovered from the almirah in the upstair part of the appellant's house. This practically negatives the suggested explanation that P.W. 1 merely kept the articles there, and that the appellant never took them. Hence, I certainly have to accept

the evidence that the trap was completely successful, and that the appellant did receive the articles in question from P.W. 1, as a form of illegal gratification.

Two other arguments have been pressed before me by Sri Kumaramangalam for the appellant. They are of considerable importance, and of the character of mixed issues of fact and law. The first argument relates to the ingredients of the offence defined under section 165, Indian Penal Code, in relation to the facts of this case. The second argument relates to the legitimacy of the trap set in this particular case, and the extent to which it could legally prove any offence.

As regards the first argument, it might be expressed in the following form. The decision of the Supreme Court in *State of Ajmer* v. *Shivji Lal*[1], is authority for the view that, as far as an offence under section 161, Indian Penal Code, is concerned, it must be established that the appellant told the agent that he would render service by approaching a particular public servant, which is one of the essential ingredients of the offence. I might also refer to *K. Prasad* v. *State*[2], which is to the effect that a connection between the payment and the performance of the official duty must be established, for proof of guilt under section 165, Indian Penal Code. The point is that the second clause of section 165, Indian Penal Code refers to

" Business transacted or about to be transacted by such public servant, or having any connection with the official function of himself or of any public servant to whom he is subordinate."

In the present case, one of the admitted features is that the appellant had nothing to do with the export licence in question, its cancellation, or the reversal of that decision in appeal. This is very clear from the evidence of K. Vasudevan (P.W. 4) who categorically states :

" Officially he (accused) had no connection whatsoever with K. R. Naidu's application or the issue of export permit for chillies. The right is mine and my superiors. Accused had nothing to do with it either at that stage or at the stage of appeal."

No doubt, the Joint Chief Controller had everthing to do with the matter, and the appellant is admittedly his subordinate. The argument of the learned Public Prosecutor is that, in this sense, the ingredient is complete and fulfilled upon the facts. The argument of Sri Kumaramangalam is that it is not enough that the appellant should be a general administrative subordinate of the Chief Controller. He must be a subordinate in respect of the matter in question, in the sense that the matter must belong to that sphere of duties which is common to both the subordinate and superior officers. The point is bare of authority and, had the Legislature intended such a restricted meaning, I do not see why words to that effect should not have been used in the section. Undoubtedly, if we were to apply section 161, Indian Penal Code, the present facts would not be enough, for there is no evidence that the appellant said that he would use his influence with the Joint Chief Controller or his own colleague (P.W. 4), or with any designated public servant. The evidence is that the appellant merely stated that he would use his influence to see that the export permit was finally issued. But the facts do appear to be sufficient to establish the ingredients under section 165, Indian Penal Code in the strict sense of the language employed. Hence, this argument would seem to lack foundation.

The second argument of Sri Kumaramangalam is an even more vital and significant one, which relates to the matter of traps in general, and the legitimacy of these methods. I find from a review of the case-law upon the subject that these methods have been repeatedly deplored in decisions of Courts. But the Courts have equally and regretfully acknowledged the necessity for such methods, in order to see that corrupt officials are brought to book. It may be sufficient to refer to the following authorities in this connection: *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*[3], *State of Bihar* v. *Basawan Singh*[4], *Ramanlal* v. *State of Bombay*[5], *Ramakrishnan*

1. (1959) S.C.J. 911 : (1959) M.L.J. (Crl.) 589.
2. (1955) M.L.R. Crl. 455.
3. (1954) S.C.J. 362.
4. (1958) S.C.J. 856 : (1958) 2 An.W.R. (S.C.) 136 : (1958) 2 M.L.J. (S.C.) 136 : 1958 M.L.J. (Crl.) 641.
5. A.I.R. 1960 S.C. 961.

v. *Delhi State*[1], and *Ramjanam Singh* v. *Bihar State*[2]. Certain of these decisions suggest a line of distinction between legitimate traps and illegitimate traps ; and the principles are broadly indicated. The argument, with reference to the present facts, is this. Since P.W. 1 cannot be believed without due corroboration, we have only his word for the version that the appellant agreed to receive illegal gratification in this case for obtaining the permit, and, moreover, that the appellant suggested this. On the contrary, since P.W. 1 was already known to the Deputy Superintendent, it is at least possible that P.W. 1 took the initiative, and attempted to seduce the appellant, and actually won him over into the taking of the bribe, by pressing temptation before the public servant. This has been deprecated as practically amounting to the abetment of an offence. It is sufficient to refer to the observations of their Lordships of the Supreme Court in *Ramjanam Singh* v. *Bihar State*[2] to the effect that, whatever the criminal tendencies of a man might be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law, and that this is all the more heinous where the temptation is at the instance of those who are the guardians and keepers of the law. As I have already stated, this kind of trap really amounts to the creation of an artificial crime, and the abetment of that crime, either by the police authorities or their tools. I would certainly agree that, where such a method is employed, it is reprehensible in the extreme ; practically this alone might make the conviction illegal. The question is whether the trap designed in the present case actually fell within this category.

After a careful consideration of the facts on record, I am of the view that we cannot come to the conclusion that the trap designed in this case was really founded upon a solicitation of the appellant and the pressing of temptation upon him, instead of the appellant himself suggesting the bribe in the first instance. The evidence is to the effect that the appellant suggested the bribe, and even stipulated the form of bribe. We have no particular reason to disbelieve P.W. 1 on this point, whatever his antecedents might otherwise be. Nor do we have any ground to assume that P.W. 1 suddenly took it into his head to tempt the appellant by proffering the suggestion himself, that P.W. 1 first broke down the integrity of the appellant, and then divulged the scheme to the appellant. Hence, upon the probabilities, I am inclined to the view that it must have been the appellant who suggested illegal gratification and the form of it. Since the form included two cement bags, it seems most unlikely that the suggestion came from P.W. 1, inclusive of this specific detail. Consequently, I do not think that the trap designed in this case falls within the mischief of the prohibited category, repeatedly condemned in the decisions referred to above.

In resulting analysis, therefore, I find that the conviction is correct, and must be confirmed. As regards the sentence, I think that we must bear in mind the grievous penalties already suffered by the appellant, who had hitherto an unblemished record. It must be remembered that for a man who has previously lived an honourable life, at least in outward semblance, the very disgrace of a conviction of this kind and dismissal from employment are grievous penalties. Bearing these in mind, as also the protracted nature and suspense of the proceedings suffered by the appellant and his total dismissal from service, I reduce the sentence to a fine of Rs. 400 or to rigorous imprisonment for three months in default. Time for payment of the fine, one month.

K.L.B. *Sentence reduced.*

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1. (1956) S.C.J. 432 : (1956) 2 M.L.J. (S.C.) 4. 2. A.I.R. 1956 S.C. 643.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE RAMAKRISHNAN.

The Council of the Institute of Chartered Accountants of India, New Delhi .. *Referring Authority.*

The Superintendent of Police, Crime Branch, C.I.D., Madras .. *Complainant**

R. Rajamany, F.C.A., Chartered Accountant .. *Respondent.*

Chartered Accountants Act (XXXVIII of 1949), *sections* 21 *and* 22 *and Schedule—' Misconduct '—" Gross negligence"—Auditor of bank—Functions and duties of—Auditor failing to scrutinise accounts himself and abdicating duties to assistants—If guilty of gross negligence.*

An auditor occupies a special position in a company. He is, no doubt, not an officer of the company except for the limited purposes specified in the Companies Act. An auditor is in a sense, the agent of the shareholders. In the case of a banking company, his responsibilities should be even greater as the audit is for the protection of not merely the shareholders but of the investing public as well. It is his duty to see that the management of the bank publishes a true statement of the bank's financial position.

No auditor can escape from personal liability by taking shelter under the misconduct of his own employees. The auditor should bring to bear upon his work great skill, care and caution which a reasonable auditor would use in the discharge of his duties. What is reasonable skill, care and caution must depend upon the circumstances of each case. The auditor's position may be described as that of a watch dog. Callousness and irresponsible abdication of his work can never be regarded as anything but misconduct ; this is more so in regard to a bank which has to handle the monies of the public. The duty of the auditor is to scrutinise the accounts very carefully so as to give a real picture of the financial position of the bank in the balance sheets. An auditor who does not personally look into the accounts but merely delegates it to his assistants who are not shown to possess the requisite status, qualifications or capacity—cannot be said to be acting with due skill and care, and his act in abdicating his functions to his subordinates must be held to amount to gross negligence.

S. Packman v. *Lewis*, L.R. 3 H.L. 171, and *London and General Bank*, In re, L.R. (1895) 2 Ch. 682 and 683, followed.

Case of misconduct of the respondent, M. Rajamany, F.C.A., forwarded to the High Court under section 21 of the Chartered Accountants Act, 1949 for orders.

R. Ramamurthi Ayyar, for the Council of Institute of Chartered Accountants of India (Referring Authority).

S. Bhaskaran, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This is a reference under section 21 of the Chartered Accountants Act, 1949 (Act XXXVIII of 1949). The proceedings out of which this reference arises were initiated on a complaint dated 15th September, 1953 made to the Council of the Institute of Chartered Accountants of India by the Superintendent of Police, Crime Branch (C.I.D., Madras) who was entrusted with the investigation into certain irregularities committed by the management of the Hanuman Bank, Ltd. (now under liquidation). The complainant charged the respondent who was practising as a Chartered Accountant at Thanjavur and who was the auditor of the bank with professional misconduct.

The Hanuman Bank, Ltd., was incorporated in the year 1933 with head-quarters at Thanjavur. It had several branches in the district and had extensive business. Most of the depositors belonged to middle class. Systematic acts of dishonesty and malversation of the bank's funds appear to have been committed by those in charge of its management. These led to an inevitable run on the bank and culminated in an order by this Court on 5th November, 1951 in O.P. No. 192 of 1947 for the winding up of the bank. Messrs. Brahmiah & Co., auditors were appointed as the Official Liquidators. The police investigation was made by a special staff of the C.I.D. deputed for the purpose. On 19th September, 1948 a charge-sheet containing 67 charges was filed against the respondent and 27 others

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* Referred Case No. 2 of 1961.

5th May, 1961.
(15th Vaisaka, 1882, Saka.)

under section 120-B read with sections409 and 477-A of the Indian Penal Code. A Special Magistrate was appointed to conduct the enquiry; the enquiry lasted for nearly three years during the course of which 203 witnesses were examined and nearly 6,000 exhibits were marked. On being moved by the accused at that stage, the High Court quashed the charges on the ground that it was impracticable to try them at one trial without confusion; this Court directed a *de novo* trial in accordance with the provisions of section 240 of the Criminal Procedure Code. The order directing *de novo* trial was set aside by the Supreme Court on 12th December, 1952. The result was that the criminal proceedings initiated against the respondent and others failed.

Investigation by the police revealed certain other irregularities which showed that it was the callousness of the respondent that facilitated the frauds committed by the management. The investigating officer filed a complaint to which reference has been made earlier to the Council of the Institute of Chartered Accountants, setting out several acts of misconduct on the part of the respondent in relation to his duties as auditor of the bank. The Secretary of the Council promptly forwarded a copy of the complaint to the respondent and called upon him to explain. A written statement was filed by the latter in November, 1953. The enquiry was taken up by the disciplinary committee of the council but, for one reason or another, the enquiry was adjourned from time to time. During that period there was a change in the personnel of the Committee, and that necessitated a *de novo* enquiry. Meanwhile proceedings which were taken by the Official Liquidators, for misfeasance of the directors of the bank and the auditor, were concluded before this Court. Subrahmanyam, J., after an elaborate enquiry found that the persons in management of the bank and the auditor were guilty of several acts of malversation of the bank's funds, gross negligence, etc. The learned Judge held that a large part of the responsibility for the failure of the bank had to be borne by the auditor,* that the balance sheets prepared since the year 1943 contained false and unsustainable statements, that there were manipulations of figures taken from books and observed:

> "The auditor's liability would have to be fixed at any rate at a lakh of rupees for payment of compensation by him to the bank but he is said to be in insolvent condition and the learned counsel for the Official Liquidators agreed with me in my suggestion that no decree need be passed against him, since, if a decree were passed the only result would be that the Official Liquidators would have to come to Court again for an application for writing off the amount due under such decree."

Thus even the misfeasance proceedings came to nothing so far as the auditor (respondent) was concerned. The disciplinary committee took up the complaint against the respondent and enquired into the matter; there can be no doubt that everybody concerned was tired of the case. The complainant selected only six of the several charges made by him for proof at the enquiry. Of the six, he did not press three. The committee found that one of the three remaining charges had not been made out. What then survived were the two charges which were Nos. 3 and 5 in the list; they were:—

> *Charge No.* 3.—Suppression of the total indebtedness of the directors in the balance-sheet for 1946. As per books the dirctors were owing to the bank a sum of Rs. 15,888 as on 31st December, 1946 but in the balance-sheet the figure is shown as Rs. 9,396 only.

> *Charge No.* 5.—Wilful neglect of audit by glossing over stupendous alterations and fictitious entries in the books of accounts. The charge then proceeded so specify the over-statements of the loans on the assets side of the balance-sheet for the year ending 1944, the head office overdraft balance for the year ending 31st December, 1945 and loans for the years 1945-46.

Both the charges covered acts of wilful default and gross negligence. The respondent denied that there was wilful suppression of any particulars in the balance-sheet. He submitted that he relied on his assistants and the officers of the bank while subscribing to the balance-sheet. As regards the failure to make any reference about the alterations and fictitious entries contained in the books, he merely stated

that he was not aware of the same. The committee did not consider the question whether there was any wilful default on the part of the respondent as it was not the complainant's case that the respondent was a party to the frauds committed by the management. The committee came to the conclusion that the respondent was grossly negligent in the performance of his professional duties. The report of the committee was considered by the Council of the Institute of Chartered Accountants in September, 1960 and it held that the respondent was guilty of professional misconduct under section 21 read with clause (7) of Part I of the Second Schedule to the Act. The Council, however, made a recommendation to the High Court that although the case was one for removing the name of the respondent from the register of members, in view of the plea of mercy made by him he might be dealt with leniently in the matter of punishment. Taking the third charge the correct amount of loan advanced to the directors as it stood on 31st December, 1946 was Rs. 15,888. The balance-sheet showed only Rs. 9,396 as the amount due from them. The maximum amount of loans advanced to the directors during the year was also not mentioned in the balance-sheet for the year. The explanation that his assistants did not place before him the relevant information can hardly exculpate the respondent. As regards overstatement covered by Charge No. 5, the balance sheet showed a sum of Rs. 5,34,426-2-10 as the amount of loans in the head office whereas the correct amount was Rs. 2,53,276-8-3. A mere look into the general ledger of the head office would have shown the correct amount. The respondent was unable to explain how the mistake came to be committed. Besides this, there were manipulations in the books maintained by the bank for the year 1945. The respondent was equally unable to offer any explanation why he did not notice them or appraise the shareholders about the same. There is considerable room for suspicion that the conduct of the respondent must have been something more than mere negligence. The only explanation was that his assistants did not do their duties properly. There were similar irregularities in the balance-sheet of the succeeding year as well but the complainant did not press the same. We are not quite satisfied whether the complainant was right in not pressing the charge in respect of the accounts for 1946, for if the charge were proved, one could legitimately come to the conclusion that the case was not one of mere negligence on the part of the respondent but of wilful default as well. On the materials now available, the conclusion arrived at by the Council that the respondent has been guilty of gross negligence in the discharge of his duties as auditor of the bank is unassailable.

Section 21 of the Chartered Accountants Act provides for the punishment of a chartered accountant who is a member of the Institute of Chartered Accountants if he is guilty of misconduct. Section 22 defines what misconduct is, that is conduct which if proved will render a person unfit to be a member of the Institute. The section also provides that acts and omissions specified in the Schedule to the Act should be deemed to be misconduct.

Clause (*q*) of the Schedule refers to " being grossly negligent in the conduct of professional duties. " Having regard to the provisions of section 22 and clause (*q*) of the Schedule, it is unnecessary to consider whether there was any moral turpitude on the part of the respondent when he was grossly negligent in the discharge of his duties. The only plea of the respondent was that he trusted his assistants and the officers of the bank. No auditor can escape from personal liability by taking shelter under the misconduct of his own employees. The auditor occupies a special position in a company. He is no doubt not an officer of the company except for the limited purposes specified in the Indian Companies Act. As has been stated in *S. Packman* v. *Lewis*[1], an auditor is in a sense the agent of the shareholders. In the case of a banking company, his responsibilities should be even greater as the audit is for the protection of not merely the shareholders but of the investing public as well. It is his duty to see that the management of the bank publishes a true statement of the bank's financial position. In re *London and General Bank*[1], Lindley, L. J., observed :

1. L.R. 3 H.L. 171.

"His business is to ascertain and state the true financial position of the company at the time of the audit and his duty is confined to that but then comes the question how is he to ascertain that position. The answer is by examining the books of the company but he does not discharge his duty by doing this without enquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so Unless he does this, his audit would be worse than an idle farce."

The rule then is that the auditor should bring to bear upon his work great skill, care and caution which a reasonable auditor would use in the discharge of his duties. What is reasonable skill, care and caution must undoubtedly depend on the circumstances of each case : the auditor's position has been picturesquely described as that of a watch dog. Callousness and irresponsible abdication of his work can never be regarded as anything but misconduct : this is more so in regard to a bank which has to handle the monies of the public. It will be the duty of the auditor to scrutinise the accounts very carefully so as to give a real picture of the financial position of the bank in the balance-sheets. An auditor who does not personally look into the accounts but merely delegates it to his assistants cannot be said to be acting with due skill and care. There is nothing in the present case to indicate the status, qualifications or capacity of his assistants. Under the circumstances the conduct of the respondent in abdicating his functions to his subordinates can only amount to gross negligence. Having regard to the seriousness of the charge the appropriate punishment would, as the Council has stated, be the removal of the name of the respondent from the register of members. The Council has, in the special circumstances of the case recommended lenient punishment and having regard to the fact that the respondent is now nearly 65 years old, we consider that that penalty need not be imposed in the circumstances of the case. The learned advocate appearing for the respondent submitted that a reprimand from the Bench would meet the ends of justice. We cannot, however, accept this. In our opinion, the removal of the respondent's name from the register of members of the Institute of Chartered Accountants for a period of three years will meet the ends of justice. We direct accordingly. No order as to costs.

P.R.N. ——— *Name removed from register of members for three years.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction).

MR. JUSTICE RAMACHANDRA IYER.

Rangaswami (son of Munian) and another .. *Petitioners**

v.

The Registrar of Trade Unions and another .. *Respondents.*

Trade Unions Act (XVI of 1928),—Employees of the Madras Raj Bhavan—If can be registered as a trade union under the Act.

The workers in the Raj Bhavan cannot be stated to be employed in a trade or business carried on by the employer. The services rendered by them are purely of a personal nature. The employees are also under Government, their service being regulated by statutory rules. The union of such workers would not come within the scope of the Trade Unions Act so as to entitle it to registration thereunder.

It is doubtful whether at all it could be said that the Industrial Disputes Act and the Trade Union Act form as it were, a system or code of legislation so that either could be read together as in *pari materia* ; that is forming one system and interpreting one in the light of the other.

Two distinctive features of an industry are (1) that the employer as well as the employee should be engaged in the 'industry' however wide the meaning of the word may be and (2) there should be co-operation between both of them for achieving the particular result. A mere personal service however much it might have been organized would not possibly be an undertaking within the meaning of the Act ; the essential condition is only the personal service given to the employer.

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1. L.R. (1895) 2 Ch. 682-683.

* O.P. No. 19 of 1960. 4th November, 1960. (13th Kartika, 1882, Saka.)

Petition for setting aside the order of the 1st Respondent dated 12th November, 1959 passed in D-2-11213 of 1959 and for directing the Respondent to consider the application to register the trade union dated 9th February, 1959 in accordance with law and register the trade union under the name and style of " Madras Raj Bhavan Workers ' Union ".

S. Ramasubramanyam, for Petitioners.

The Government Pleader (*A. Alagiriswami*), for Respondents 1 and 2.

The Court delivered the following

JUDGMENT :—This is a petition under section 11 of the Trade Unions Act seeking to set aside the order of the Registrar of Trade Unions, Madras, refusing to register the union of employees of the Madras Raj Bhavan as a trade union under the Trade Unions Act XVI of 1928, which for the sake of brevity I shall hereafter refer to as the Act.

In the Raj Bhavan at Guindy, a number of persons are employed in various capacities such as household staff, peons, chauffeurs, tailors, carpenters, maistries, gardeners, sweepers etc. There are also gardeners and maistries employed at the Raj Bhavan at Ootacamund. Those persons are employed for doing domestic and other services and for the maintenance of the Governor's household and to attend to the needs of the Governor, the members of his family, staff and State guests. There are two categories of employees : (1) those whose services are more or less of a domestic nature. They number 102. The services of these persons are pensionable and are governed by certain rules framed by the Governor of Madras; and (2) those who formed part of the work charge establishment consisting of maistries and gardeners. There are 33 such persons employed at Guindy and 35 at Ootacamund. Their duties consist in maintaining the gardens. Their service is not pensionable but they would be entitled to gratuity at certain rates. There are separate rules prescribing the conditions of their service framed under the Proviso to Article 309 of the Constitution. Both the categories of the staff are appointed by and are under the disciplinary control of the Comptroller. With the object of securing better service conditions and to facilitate collective bargaining with the employer, the employees formed themselves into an union called the Madras Raj Bhavan Workers Union. On 9th February, 1959, seven of the employees applied to the Registrar of Trade Unions, Madras, for registration of their union as a trade union under the Trade Unions Act of 1928. The applicants did not however claim before the Registrar that the employees were engaged in either a trade or an industry ; the claim was that their services could not be held to be purely domestic services and that therefore their union would be entitled to the benefit of registration under the Trade Unions Act. The Registrar was of the view that before a union can be registered, the members thereof must be connected with a trade or industry or business of an employer, and that condition not being fulfilled in the present case, the employees could not be held to be workmen within the meaning of the Act to entitle them to the registration : the application for registration was rejected.

Mr. Ramasubramanyam, who appeared for the petitioners, impugned the correctness of the view taken by the Registrar. His argument ran thus. The term ' workmen ' under the Act would include one employed in an industry. Although there is no definition of the term 'industry' in the Act itself, the definition of the term given in the Industrial Disputes Act should be adopted for ascertaining its meaning, as both the enactments related to the same subject, *viz.*, the betterment of the conditions of labour in the country. If that were done, the term ' industry ' which is defined to include an undertaking would be comprehensive enough to cover the case of employees like these engaged in service at the Raj Bhavan who systematically do material service for the benefit of not merely the members of the Governor's household but also to visistors and guests as well. Therefore, the employees in the present case should be held to be employed in an undertaking by the employer within the meaning of that term. Further as the Comptroller directs the sale of unserviceable articles as well as surplus produce of the gardens in the Raj

Bhavan, the activity of the employer should be held to partake the character of a trade or business as well.

I am however unable to accept the argument. The question whether Government servants who form an association amongst themselves could have their union registered under the Trade Unions Act was considered by me in O.P. No. 312 of 1958. I expressed the opinion that employees under Government whose services were regulated by statutory rules could not form themselves into a union so as to have it registered as a trade union. I am informed that the judgment in that case is the subject-matter of an appeal which is pending. It is however unnecessary to decide this case on the basis of that judgment as I am of the view that the claim of the Petitioners has to fail on an independent ground as well, a ground which was not dealt with by me in the former case.

Under section 4 of the Trade Unions Act, a trade union could apply for and obtain registration therefor. That provision states :

> " any seven or more members of a trade union may by subscribing their names to the rules of the trade union and by otherwise complying with the provisions of this Act with respect to registration apply for registration of the trade union under this Act."

It is therefore necessary to consider what would be a trade union.

Section 2 (*h*) defines a trade union thus :

> " trade union means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions. "

> (*Proviso is omitted as unnecessary*).

The term 'workmen' has not been independently defined in the Act. But in the definition of the term "trade dispute" (which defines such dispute as one between employers and workmen, etc.) the definition of the term 'workmen' is found. That runs :—

> " Workmen means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises. "

The term 'trade union' as defined under the Act contemplates the existence of the employer and the employee engaged in the conduct of a trade or business. The definition of the term 'workmen' in section 2 (*g*) would *prima facie* indicate that it was intended only for interpreting the term 'trade dispute'. But even assuming that that definition could be imported for understanding the scope of the meaning of the term 'trade union' in section 2 (*h*) , it is obvious that the industry should be one as would amount to a trade or business, *i.e.*, a commercial undertaking. So much is plain from the definition of the term 'trade union' itself. I say this because the definition of 'industry' in the Industrial Disputes Act is of wider significance. Section 2 (*j*) of the Industrial Disputes Act which defines ' industry ' states its meaning as

> "'any business, trade, undertaking, manufacture or calling of employers and includes any calling, services, employment, handicraft or industrial occupation or avocation of workmen ".

An undertaking which is not of a commercial nature will come within the scope of that enactment (*Vide State of Bombay* v. *Hospital Mazdoor Sabha*[1]). The object behind the Industrial Disputes Act is to secure industrial peace and speedy remedy for labour discontent or unrest. A comprehensive meaning of the term ' industry ' was evidently thought necessary by the Legislature in regard to that Act. But the same thing cannot be said of the Trade Unions Act. The history and object of that enactment show that it was intended purely to render lawful, organisation of labour to enable collective bargaining. The provisions of the Act contemplate the admission of even outsiders as members and participation in political activities. That would itself dictate that the benefits conferred by the Act should be

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1. (1960) S.C.J. 679 : (1960) 2 S.C.R. 866 : A.I.R. 1960 S.C. 610.

enjoyed by a clearly defined category of unions. I am very doubtful whether at all it could be said that the Industrial Disputes Act and the Trade Unions Act form as it were a system or code of legislation so that either could be read together as in *pari materia*, that is, as forming one system and interpreting one in the light of the other.

There can be no doubt that if a trade union is interpreted as one connected with a trade or a business, it cannot be said that the employer in the present case is having such a trade or business. This however is subject to the consideration of the question whether the sale of unserviceable materials and surplus garden produce will amount to a trade or business activity. I shall refer to it a little later.

Let me assume however that the definition of the term ' industry ' in section 2 (*j*) of the Industrial Disputes Act will apply to the Trade Unions Act. It has then to be seen whether the authorities of the Raj Bhavan could be held to be employers engaged with the workmen in any undertaking within the meaning of the term ' industry ' in the Industrial Disputes Act.

In *State of Bombay* v. *Hospital Mazdoor Sabha*[1], the question arose whether the employees in a hospital run by the State could be held to be engaged in an undertaking of the State so as to entitle them to raise an industrial dispute. The Supreme Court observed :

"It is clear, however, that though section 2 (*j*) (Industrial Disputes Act) uses words of very wide denotation,a line would have to be drawn in a fair and just manner so as to exclude some callings, services or undertakings. If all the words used are given their widest meaning all callings would come within the purview of the definition ; even service rendered by a servant purely in a personal or domestic matter or even in a casual way would fall within the definition. It is not and cannot be suggested that in its wide sweep the word 'service' is intended to include service however rendered in whatsoever capacity and for whatsoever reason. "

The Supreme Court held that the definition of the term ' industry ' in section 2 (*j*) was wider than the conception of trade or business as commonly understood. But an undertaking in order to come within that definition would be an activity which involves the co-operation of the employer and the employees with the object of the satisfaction of material human needs, if organised or arranged in a manner in which trade or business is generally organised or arranged, and if it were not of a casual nature nor one for oneself or for pleasure. It is well-known that in an industry, capital and organisation, on the one hand, and labour, on the other, co-operate to achieve industrial production. Therefore, a mere personal service, however much it might have been organised, would not possibly be an undertaking within the meaning of the Act ; the essential condition is only personal service given to the employer.

Two distinctive features of an industry therefore are : (1) that the employer as well as the employees should be engaged in the industry, however wide the meaning of the term might be ; and (2) there should be co-operation between both of them for achieving the particular result. The first of the two attributes of an industry is succinctly stated by Issacs, J., in *Jambunna Coal Mine No Liability* v. *Victorian Coal Miners' Association*[2], thus :

"An industry contemplated by the Act is apparently one in which both employers and employees are engaged, and not merely industry in the abstract sense, or in other words, the labour of the employees given in return for the remuneration received from his employer. As suggested, not only by the words defining ' industry ' itself, but also by Schedule B and by such a phrase in the definition of ' industrial dispute ' as employment in industries carried on by or under the control of the Commonwealth *etc.*, an ' industry ' as intended by Parliament seems to be a business *etc.*, in which the employer on his own behalf is engaged as well as the employees in his employment. Turning to the specific definition of ' industry 'it rather appears to mean a business (as merchant), a trade (as cutler), a manufacturer (as a flour miller), undertaking(as a gas company), calling (as an engineer) or service (as a carrier) or an employment (a general term like 'calling ' embracing one of the others, and intended to extend to vocations which might not be comprised in any of the rest) all of these expressions so far indicating the occupation in which the principal, as I may call him, is engaged whether on land or water. If the occupation so described is one in which persons are employed for

1. (1960) S.C.J. 679 : (1960) 2 S.C.R. 866 : A.I.R. 1960 S.C. 610.

2. 6 C.L.R. 309 at 370.

pay, hire, advantage, or reward, that is, as employees, then, with the exceptions stated, it is an industry within the meaning of the Act."

This view was accepted in *Federated Engine Drivers and Fireman's Association of Australia* v. *Broken Hill Proprietary Co., Ltd.*[1].

There can thus be no industry where the employer is not engaged in common with the employees with the definite objective of the achievement of the material needs of humanity and that in an organised manner. In the definition of the term 'trade union' to which I made reference earlier, the regulation of relationship contemplated is in regard to the conditions of service of the employees which postulates the existence of an employer who is concerned in the business, trade or industry. It has therefore to be seen whether in the circumstances of the case it can be said that persons in control of the Raj Bhavan can be held to be an employer in an industry however widely that term may be understood. The ansswer to that question presents no difficulty and can only be in the negative.

The decision in *State of Bombay* v. *Hospital Mazdoor Sabha*[2], emphasised that the activity contemplated by the term 'industry' in section 2 (*j*) of the Industrial Disputes Act involved the co-operation of the employer and the employees. In *Osmania University, Hyderabad* v. *The Industrial Tribunal, Andhra Pradesh*[3], it was held that if there was no co-operation between capital and labour, a dispute between an employer and an employee would not be an industrial dispute. The learned Judges laid down that the correct test for ascertaining whether there was such relationship so as to entitle the workers to raise an industrial dispute was to see whether capital and labour were both engaged in the purpose sought to be achieved by the undertaking. In that case, there was a dispute between the Osmania University and its employees. It was held that such a dispute could not be held to be an industrial dispute for there was neither co-operation of capital and labour nor were the activities of the University strictly connected with the production and distribution of wealth. In the case before me, the test of co-operation between the employer and the employee for advancing the material needs of humanity has not been satisfied. It cannot be said either that the employer is engaged in any such activity and that he requires the services of the employees to be done for that purpose.

I cannot agree with the learned counsel for the petitioners that the mere fact that the employees serve the visitors and State guests of Raj Bhavan, nor the fact that unserviceable materials and surplus produce of the gardens of the Raj Bhavan are occasionally sold would show that there was co-operation between the employer and the employees for the purpose of a trade or business. The services rendered to the State guests are personal services to them and indirectly to the employer. The occasional sales of unserviceable articles and garden produce are incidents of the ordinary administration of Government property. They are done in accordance with certain rules framed by the Government. They would not amount to a trade or business.

Learned counsel for the petitioner placed considerable reliance on the decision in *Bengal Club Ltd.* v. *Shanti Ranjan*[4], where it was held that an incorporated company maintaining and carrying on a club of the kind mentioned in the case which did a catering business and also a business in licensed alcohol was an industry within the meaning of the Industrial Disputes Act. It is obvious that there was an element of trade or business in that case.

To sum up, even apart from the circumstance that a large section of employees at Raj Bhavan are Government servants who could not form themselves into a trade union, it cannot be stated that the workers are employed in a trade or business carried on by the employer. The services rendered by them are purely of a personal

1. 12 C.L.R. 399.
2. (1960) S.C.J. 679 : (1960) 2 S.C.R. 866 : A.I.R. 1960 S.C. 610.
3. (1960) 1 An.W.R. 265.
4. A.I.R. 1956 Cal. 548.

nature. The union of such workers would not come within the scope of the Act so as to entitle it to registration thereunder.

The order of the Registrar of Trade Unions rejecting the application of the Petitioner, is, therefore, correct. This petition is dismissed with costs.

V.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAMAKRISHNAN.

The Indian Bank, Limited, Madras .. *Petitioner**

v.

The Industrial Tribunal, Madras and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *section* 10—*Reference to the Industrial Tribunal as regards "quantum of bonus payable to the workmen of the petitioner bank for the year* 1957"—*Subsequent reference to the National Tribunal as regards " Bonus, Principles and conditions under which payable, qualifications for eligibility and method of computation "—Section* 10 *clause* (6) *of the Act—Applicability and effect.*

There could be a general reference and a particular reference in regard to bonus and the general reference to a National Tribunal about the principles for the determination of bonus to Banks in general should not be treated as including a particular reference about the bonus payable, in the case of a particular Bank for a particular year and a reference of the latter kind cannot be quashed under section 10 (6) of the Industrial Disputes Act. Section 10 (6) should be strictly construed. It should be applied only if the Tribunal is satisfied that the subject matter of the specific reference in regard to which the provision is invoked, is comprised in the subject matter of the general reference to the National Tribunal.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the 1st Respondent dated 22nd December, 1960 in I.D. No. 18 of 1960, and quash the said order and made therein.

R.M. Seshadri and *B. Lakkappa Rai*, for Petitioner.

A. Ramachandran for Messrs. *Row and Reddy*, for Respondents.

The Court made the following

ORDER :—This is a petition under Article 226 of the Constitution praying for the issue of a writ of prohibition or any other appropriate writ against the first respondent. The circumstances which gave rise to the petition are the following.

The petitioner is the Indian Bank, Limited, Madras. The first respondent, is the Industrial Tribunal, Madras. The second respondent is the President, Indian Bank Employees Union and the third respondent is the Secretary-General, Federation of the Indian Bank Employees' Union. By an order of the Government of India dated 18th February, 1960, under section 10 of the Industrial Disputes Act, a dispute was referred to the first respondent Tribunal for adjudication. The matter in dispute was the " quantum of bonus payable to the workmen of the petitioner bank for the year 1957. " Subsequently, the Government of India constituted a National Tribunal, and on 22nd September, 1960, referred to it, for adjudication the following :

"Bonus—Principles and conditions under which payable, qualification for eligibility and method of computation after making provision for all matters for which provision is necessary by or under any of the Acts applicable to the Banks or which are usually provided for by Banks. "

The details of the reference as given above are found in Schedule II of the Government of India's Notification dated 22nd September, 1960. In Schedule I, is given a list of banking companies between whom and their workmen, the dispute specified in Schedule II, existed or was apprehended at the time Notification was issued. Schedule I gives the names of 73 banks, and the petitioner, the Indian Bank, is

* W.P. No. 1337 of 1960. 6th March, 1961. (15th Phalguna, 1882, Saka).

item 32 in it. When the matter came up before the Industrial Tribunal, Madras (Sri K. Ramaswami Gounder), a preliminary objection was raised by the petitioner herein, *viz.*, the management of the Indian Bank, that the Tribunal had no jurisdiction to proceed with the adjudication and that the reference for adjudication to the Tribunal, should be deemed to have been quashed by reason of clause (6) of section 10 of the Industrial Disputes Act. This preliminary objection was considered at length by the Tribunal, and by an order passed on 22nd December, 1960, the Tribunal overruled the preliminary objection, and directed further enquiry to proceed on the reference for adjudication. Aggrieved against the above order, the petitioner has filed the present petition applying for the issue of a writ to the Industrial Tribunal for " prohibiting the first respondent from proceeding with the enquiry and to pass such further or other order or orders as might be deemed fit."

Section 10, clause (6) of the Industrial Disputes Act on which the petitioner relied, for his relief runs :

" Where any reference has been made under sub-section (1-A) to a National Tribunal, then notwithstanding anything contained in this Act, no Labour Court or Tribunal shall have jurisdiction to adjudicate upon any matter which is under adjudication before the National Tribunal, and accordingly,—

(*a*) if the matter under adjudication before the National Tribunal is pending in a proceeding before a Labour Court or the Tribunal, the proceeding before the Labour Court or the Tribunal, as the case may be, in so far as it relates to such matter, shall be deemed to have been quashed on such reference to the National Tribunal.

(*b*) it shall not be lawful for the appropriate Government to refer the matter under adjudication before the National Tribunal to any Labour Court or Tribunal for adjudication during the pendency of the proceeding in relation to such matter before the National Tribunal. "

The petitioner contended that the matter referred to the National Tribunal by the Central Government, was without any doubt whatsover, a fundamental and integral part of the reference pending before the first respondent, and that there could be no decision on payment of bonus without first settling or determining the principles or formula regarding the payment of bonus in banks. This point has been conceded by the Industrial Tribunal in its order above mentioned. Therefore, what the first respondent was called upon to decide would encroach on what the National Tribunal was required to decide. The Tribunal was clearly in error in claiming jurisdiction to proceed with the enquiry, when necessarily and unavoidably it has to decide the same question which is pending as a question common to all banks, on a nation wide level, before the National Tribunal. Section 10 (6) has been enacted just for the purpose of avoiding such conflicts. Strength was sought to be obtained for this contention by referring to an earlier occaion when consequent on a particular decision of the first respondent, arising in the course of the same proceedings, the Tribunal held that it had a right to call upon the petitioner Bank to disclose information about its secret reserves. Aggrieved against that order, the Management took up the matter in W.P. No. 362 of 1960. This came up before Ramachandra Iyer, J., who allowed the petition and quashed the direction of the Tribunal, making the observation :

" . . . . before there could be an order for inspection it has first to be ascertained whether the Full Bench formula would apply to the case of the banking company, and if the formula is held not applicable to it, whether (in) working any formula evolved for it, it would be necessary to know the amount set apart or provision made (for secret reserves). "

It was pointed out that this observation of the learned Judge, would show the importance of laying down general priciples for the calculation of bonus, as a prerequisite to the adjudication under reference before the first respondent, and that these selfsame general principles were also now before the National Tribunal for adjudication.

The above contentions, which are extracted from the affidavit filed in support of the petition, were strenuously contested in the counter affidavit filed on behalf of the second and third respondents, who represent the workers of the bank. They first of all explained the background against which the Central Government made the reference to the first respondent Tribunal on 18th February, 1960. The question of

bonus in the case of banks as a general question, was referred in 1949, to the "Sen Tribunal", the matter referred to being "Bonus including the qualifications for eligibility and method of payment". The Sen Tribunal in its award held that the reference comprised disputes of a general nature regarding bonus, and did not cover disputes relating to the quantum of bonus for particular years in respect of particular banks. The Sen Award was rendered invalid by a decision of the Supreme Court, and thereafter the same point came for decision before the "Sastri Tribunal". The Sastri Tribunal came to the same conclusion, *viz.*, that the reference did not include the determination of the quantum of bonus payable for the previous years by any of the banks. This view was confirmed by the Supreme Court in *State Bank of India and others* v. *Their Workmen*[1]. It is against the background of the above proceedings, and also in the face of a strike, that the present reference dated 18th February, 1960, relating to the quantum of bonus payable to the workmen of the petitioner bank for the year 1957, was made to the first respondent. The strike was called off as a result of an agreement to have the dispute settled by adjudication by the Tribunal. Even before the present reference the workmen Union had applied to the Government of India for referring the question to a National Tribunal, on the ground that it involved a question of National importance but the Government of India in its reply dated 11th October, 1958 stated that the issue concerned only a particular bank, and that it was inappropriate to refer it to National Tribunal. In the light of the above considerations, it should be held that the reference to the National Tribunal related to a dispute of a general nature which did not include demands in respect of particular years by workmen of particular banks. For dealing with such a dispute adequate principles had been laid down by the Supreme Court in its decisions, including what is called the "Labour Appellate Tribunal's Formula" approved by the Supreme Court in *Bombay Millowners' Association* v. *Rashtraiya Mill Mazdoor Sabha*[2]. The Workmen demanded bonus for this particular year only in accordance with the well-established principles mentioned above, and they never raised a dispute regarding the general principles relating to fixation of bonus. It was also pointed out that the Supreme Court had made it clear, that it had left open the question whether the Full Bench formula would apply to banks, and that it was open to the parties to canvass for or against the Full Bench formula when a dispute arose. It was further pointed out that the decision of the National Tribunal on the reference made to it would only have prospective effect and would therefore not cover the present reference. It was finally urged that the reference to the first respondent could not lapse without any relief being granted and the first respondent had a statutory duty to make an award on the pending reference relating to the bonus for 1957.

Learned counsel Sri Seshadri, appearing for the petitioner, argued that the first respondent in its order has recognised in paragraph 3 that the principles, qualifications for eligibility and method of computation of bonus, *etc.*, specifically referred to the National Tribunal for adjudication would have to be decided both by the National Tribunal as well as by the first respondent. Sri Seshadri pointed out that having conceded this identity, it was wrong on the part of the first respondent, to hold as it did in the subsequent paragraphs of its order, that the two matters were clearly different, that the matter under adjudication before the first respondent was not a matter for adjudication before the National Tribunal and that the National Tribunal would have no jurisdiction to pass an award in regard to the claim for bonus for 1957.

In dealing with this particular problem, I will consider in the first place, the scope of section 10 (6) of the Industrial Disputes Act, on which the petitioner relies for the relief sought. The first part of section 10 (6) states that on a reference being made to a National Tribunal, no Labour Court or Tribunal shall have jurisdiction to adjudicate upon any matter which is under adjudication before the National Tribunal. The second part of section 10 (6), contained in section 10 (6) (*a*) states that if the matter under adjudication before the National Tribunal is pending in a proceeding before the Labour Court or another Tribunal, the proceeding before the latter,

1. (1960) S.C.J. 842: (1960) S.C.R. 200: (1959) 2 L.L.J. (S.C.) 205.
2. 1950 L.L.J. 1247.

in so far as it relates to such matter, shall be deemed to have been quashed. These two parts are not independent, but are linked together by the use of the word "accordingly." The effect of these two provisions is not merely to impose a prohibition against proceeding with the enquiry before the Tribunal but there is also an obligation cast on the Tribunal to treat the proceedings, which would include the reference itself, as void and quash them accordingly. A special provision which contains drastic directions of the above kind, has to be construed strictly. In other words, it should be applied only if the Tribunal is satisfied that the subject-matter of the specific reference in regard to which the provision is invoked, is comprised in the subject-matter of the general reference to the National Tribunal. Again we can have a situation where a number of items are comprised in the subject-matter referred for adjudication to the Labour Court or Tribunal, and identity has been established only between one or more out of them, with the matter under reference to the National Tribunal. In this case, the bar under section 10 (6) will apply only to those items and the reference only in so far as it applies to those items, will stand quashed but the rest of reference could be allowed to proceed. On a plain reading of the matter under reference described in the schedules to the two Notifications of the Government of India, it can be stated that they are not identical, on a strict construction of the words used. It may be argued that while settling the bonus for 1957 certain general principles regarding the payment of bonus would arise for consideration as a pre-requisite; but this is a different thing from contending that these principles form the subject-matter of the reference to the first respondent. It is permissible to examine how a similar question was dealt with, when it came up before the Sen Tribunal and the Sastri Tribunal. This point has been referred to by the second and third respondents in their counter affidavit. The specific item referred to these tribunals for adjudication was "bonus, including qualification for eligibility and the method of payment". The wording there is no doubt different from the wording in the reference to the National Tribunal in the present instance. But it is permissible to hold that both the references dealt with the general principles for the grant of bonus to workmen in banks. In paragraph 234 of their Award the Sen Tribunal held that the above reference related to disputes of a general nature as contradistinct from disputes relating to the quantum of bonus for particular years in respect of particular banks. They pointed out that wherever a specific case was intended to be covered, the reference contained appropriate language. They declined to go into the demand made by several unions for bonus, with references to past years in respect of particular banks. The question was again raised by the Sastri Tribunal. The Sastri Tribunal in paragraph 345 of its Award, agreed with the view of the Sen Tribunal and observed :

> "We hesitate to hold that we are concerned with the question of quantum of benefits for particular banks and for particular years in the past in the light of profits of such banks during those periods. It may yet be open to the concerned parties where there is a real grievance to approach the Government to get a suitable reference for the future as well as for the account year 1949, 1950 and 1951."

Having made the above statement, the Sastri Tribunal, interpreting, the general reference in paragraph 346, stated:—

> "The only question for consideration, therefore, is whether what may be called a bonus scheme for the future years can and should be devised and whether it should be made to apply retrospectively even to all banks and for all years."

Then the Sastri Tribunal proceeded to lay down some principles for the award of bonus and commended their scheme for the earnest consideration of both the parties. The decision of the Sastri Tribunal came before the Labour Appellate Tribunal. The Labour Appellate Tribunal was inclined to the view, in paragraph 330 of their decision "the claims to bonus made for the relevant years have not yet been adjudicated upon and the terms of the Reference have not been exhausted." In other words, the view of the Appellate Tribunal was that the scope of the general reference would include an adjudicaton for particular years and for particular banks. This finding came for decision before the Supreme Court of India in *State Bank of India and others* v. *Their Workmen*[1], and the finding given was :

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1. (1960) S.C.J. 842: (1960) S.C.R. 200: (1959) 2 L.L.J. 205.

". . . . . .it is clear that the Sen Tribunal also understood the items as a reference of a dispute of a general nature which did not include demands for bonus for particular years in respect of particular banks" (page 210.)

". . . . . we are of the view that the Labour Appellate Tribunal was wrong in its conclusion that the reference had not been worked out and that individual claims for bonus in respect of particular banks must be determined by another tribunal on the basis of the reference made in 1952." (page 213.)

The above history of what transpired during the Sen and Sastri Tribunals' adjudications is important not for the purpose of providing a specific authority to deal with this particular matter. It only illustrates how when a problem of a similar kind had been posed before similar Tribunals in the past, they reached the conclusion that there could be a general reference and a particular reference in regard to bonus and that the general reference about the principles for the determination of bonus to banks in general should not be treated as including a particular reference about the bonus payable, in the case of a particular bank for a particular year. It appears to me that a similar view could be taken in regard to the subject-matter of the two references to adjudication in the present case also, and that it will be improprer to resort to the remedy of quashing the reference to the 1st respondent under section 10 (6) of the Industrial Disputes Act.

Another objection strongly pressed before me by respondents 2 and 3 appears also to be significant. It was pointed out that the National Tribunal might very well give decision applicable for future years because any retrospective application would have the effect of disturbing settlements already made and expose the managments to heavy liabilities and possibly a crop of strikes. It is also possible that the Government may, acting under the powers given to them in section 17-A (1) (*b*) of the Industrial Disputes Act, declare that it will be inexpedient on public grounds affecting national economy or social justice to give effect to the whole or any part of the award of the National Tribunal, and therefore make the operation of its decision prospective and not retrospective. All these contingencies have to be taken into account before a decision could be given at this preliminary stage, that the matter referred to the first respondent for adjudication is identical in terms with the matter referred to the National Tribunal, so as to deprive the first respondent of its jurisdiction and have the proceedings quashed.

The learned counsel Sri Seshadri next urged that what he sought for in the present application was not a direction for quashing the reference in its entirety, or even a part of it, but his request was that a direction in the nature of a writ of prohibition might issue to the first respondent restraining it from deciding the general principles for grant of bonus, and leave it open to the first respondent to deal with the reference only in regard to the rest of the subject-matter of the reference.

This may appear at first sight to be an attractive and plausible line of argument. But it involves two assumptions. One is that the subject-matter of the reference to the first respondent is clearly divisible into two parts, one relating to general principles applicable to all the banks, and the other relating to their application to the petitioner bank for a particular year. The second assumption is that it can be predicated now itself that the decision of the National Tribunal on the general principles will be applicable retrospectively. I am not satisfied for the reason discussed in the foregoing paragraphs that these assumption are correct. There is also this point to be considered.

"Where proceedings are pending before an inferior Court, part of which is within, and part is outside, the jurisdiction of such Court, no prohibition lies until such Court has actually gone beyond its competency and jurisdiction." (*Vide* Halsbury's Laws of England, Hailsham Edition, Volume IX, page 825).

In view of the above, I am of the opinion that adequate grounds have not been made out to grant the prayer in this petition. The rule *nisi* is discharged and the petition is dismissed with costs. Advocate's fee Rs. 100.

K.L.B. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAJAGOPALAN, *Officiating Chief Justice* AND MR JUSTICE SRINIVASAN.

S. Santosha Nadar, Kamadikottai, Tirunelveli District .. *Petitioner**

v.

The First Additional Income-tax Officer, Tuticorin and another.. *Respondents.*

Constitution of India (1950), *Article* 226—Certiorari—*Prohibition—Writs of—Nature of and distinc tion between—Other remedy open—When bar to issue of writ—Assessment under Income-tax Act—Remedy unde Act—If bar to writ—Absence of jurisdiction to assess—Effect—Income-tax Act* (*XI of* 1922), *sections* 23, 28 *and* 34—*Construction and scope of—Assessment or reassessment under section* 34—*Jurisdiction—Limitation—Certificate for recovery of arrears under section* 46 (2) *showing larger amount than is actually due—Attachmen and sale in pursuance of—Legality—Revenue Recovery Act* (*I of* 1890), *sections* 27, 36 *and* 38.

A writ of *certiorari* is a discretionary relief and normally a writ of *certiorari* will not be viewed by the High Court as a parallel remedy which an assessee can seek simultaneously with the statutory remedies open to him under the Income-tax Act. That the assessee failed to take a plea open to him, *e.g.*, the plea of limitation, in the assessment proceedings and in the appeals that he preferred, cannot under normal circumstances place him in a better position to seek the discretionary relief of a writ of *certiorari*. Where, however, the assessee also asks for a writ of prohibition, if the order of assessment was without jurisdiction and if any portion of that order is still operative in the sense that anything is sought to be recovered from the assessee petitioner under such an order of assessment passed wholly without jurisdiction or in excess of the jurisdiction vested in the Income-tax Officer, the issue of a writ of prohibition would not be a matter of discretion and the High Court would not refuse to investigate the question whether the assessment in question was invalid as being barred by limitation or without jurisdiction.

Once an absence of jurisdiction or excess of jurisdiction is established, the fact that an alternative remedy exists is by itself no bar to the assumption of jurisdiction by the High Court to issue a writ of prohibition.

A writ of prohibition would lie when the proceedings are to any extent pending, and a writ of *certiorari* would lie for quashing the proceedings after they have terminated in a final decision. Where the recovery of the amount is impossible because the assessment proceedings were barred and without jurisdiction, there could be no objection to the order of assessment itself being set aside by the issue of a writ of *certiorari*, despite the fact that the latter is a discretionary relief and when the petitioner is entitled to a writ of prohibition, the Court would exercise its discretion in favour of granting a writ of *certiorari* as well.

Hari Vishnu v. *Ahmad Ishaque*, (1955) 1 M.L.J. 157 : (1955) S.C.J. 267 : A.I.R. 1955 S.C. 233 ollowed.

It is well settled that where an assessee has filed his return before the completion of assessment within the period of limitation allowed by law, proceedings cannot be commenced by the assessing authority under section 34 of the Income-tax Act. Section 22 (3) permits a return to be filed at any time before the assessment is made, even if no return was filed in response either to the general notice under section 22 (1) or any individual notice under section 22 (2). But section 22 (3) carries its own limitation. What section 22 (3) permits the assessee is to file his return at any time before the assessment could be lawfully made. The normal period of limitation, barring the exceptions for which section 34 (2) provides, for making an assessment being four years, a return filed after the expiry of four years cannot lead to any lawful assessment and it should therefore be treated as *non est* in law. No assessment could validly be made on such a return without recourse to section 34 (1) and recourse could be had to section 34 (1) only on the ground that no return had been filed, that is to say, 'that no return had been filed before the assessment could be lawfully completed without recourse to section 34 (1).

Where the assessee filed a return on 20th March, 1954, in resepect of the assessment for the year 1945-46, but the Income-tax Officer ignored it and issued a notice under section 34 (1) on 26th March, 1954, and completed the assessment on 5th March, 1955, it cannot be said that the return filed by the assessee on 20th March, 1954 invalidated or vitiated the notice under section 34 (1) issued on 26th March, 1954 and the initiation and completion of the assessment proceedings for 1945-46 under section 34 (3) within the period of eight years must be held to be valid.

The expression " an order of assessment in cases falling under section 34 (1) (*a*) " in section 34 (3) cannot be construed to mean an order of assessment in a case which could have been dealt with under section 34 (1) (*a*) but which was not so dealt with. The issue of the prescribed notice is a condition precedent to the assumption of jurisdiction vested by section 34 (3), and where such notice was never issued, it cannot be viewed as a " case falling within section 34 (1) (*a*) " within the meaning of section 34 (3) ; and it is not a case to which section 28 (1) (*c*) would apply and

* W.P. Nos. 1011 of 1958, 1268 to 1270 of 1960 and C.M.P. No. 4306 of 1960. 7th February 1961. (18th Magha, 1882, Saka).

the four years period of limitation would apply. The Income-tax Officer has no jurisdiction to make an assessment in such a case after the expiry of the four years period.

Commissioner of Income-tax, Bombay v. *Ranchhoddas Karsondas*, (1959) 36 I.T.R. 569; *Muthiah Thevar* v. *Commissioner of Income-tax*, (1960) 39 I.T.R. 107, followed.

Section 34 (3) exempts an order of assessment under section 23 to which section 28 (1) (*c*) applies. Concealment of income is conduct which attracts the application of section 28 (1) (*c*). Where the order of assessment contains an express finding that there had been a concealment of income, there is sufficient compliance with section 34 (*e*). It is not necessary that the order of assessment should record in express terms that the requirements of section 34 (3) were satisfied and that it was a case of assessment to which section 28 (1) (*e*) applied. It cannot be said that unless there was such an express finding the extended period of limitation for which section 34 (3) provides would not come into play. Section 34 (3) does not require that proceedings under section 28 (1) (*e*) should have been finalised and a penalty imposed as a condition precedent to assessment being completed beyond the period of four years. That would be obviously impossible. When there is an express finding that there was concealment of income that would satisfy the requirements of section 34 (3) that it is a case of assessment under section 23 to which section 28 (1) (*e*) would apply, more so when a notice under section 28 (1) (*c*) had been issued to the assessee antecedent to the completion of the assessment proceedings by the Income-tax Officer.

Mir Suba Hari Bhakta v. *Income-tax Officer*, (1960) 39 I.T.R. 617, explained.

Where the certificate issued under section 46 (2) of the Income-tax Act in respect of arrears of tax due by an assessee showed Rs. 1,01,081 as due, but the actual amount due was only Rs. 64,994 the arrears having been reduced subsequently—the certificate cannot be held to be vitiated on that account alone. But the Collector has jurisdiction even on the basis of that certificate to recover only the amount actually due. Section 27 of the Revenue Recovery Act requires that the notice of attachment should specify the arrears due, as that is what gives jurisdiction to the Collector to bring the attached property subsequently to sale under section 36 of that Act. If the attachment is vitiated the subsequent sale also would be vitiated. The Collector has no jurisdiction to attach or to bring to sale the properties to recover a sum higher than what is legally due on the date of the notice of attachment. Where the notification in the Gazette has obviously proceeded on the basis that Rs. 1,01,021 was still due, when it was not, the subsequent sale is certainly vitiated. The fact that the sale has already taken place would not affect the position when the Collector has not confirmed the sale, and the confirmation can be prevented by a writ of prohibition under Article 226 of the Constitution despite the fact that the Collector himself can be approached and despite the actual pendency of an application to set aside the sale under section 38 of the Act.

George v. *Income-tax Officer*, (1958) 1 M.L.J. 90, referred to.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to call for the records in F. No. 1509 (S) on the file of the First Additional Income-tax Officer, Tuticorin and issue a writ of prohibition forbidding the respondents from proceeding further in the matter with regard to the collection of Income-tax due from the petitioner for the assessment years 1945-46, 1946-47, 1947-48 and 1951-1952 in pursuance of the certificate granted by the 1st re spondent to the 2nd respondent.

M.R.M. Abdul Karim and *T. Martin*, for Petitioner.

S. Ranganathan, for *C.S. Rama Rao Sahib*, Special Counsel for Income-tax, on behalf of the Respondents.

The Order of the Court was made by

Rajagopalan, O.C.J.—The petitioner who was a resident of Tirunelveli district carried on business in Ceylon. The petitioner did not file any returns of his income in the assessment years 1945-46, 1946-47 and 1947-48 in response to the general notice published under section 22 (1) of the Income-tax Act. But he voluntarily filed returns for all the three years on 20th March, 1954. With reference to the assessment year 1945-46, the Income-tax Officer initiated proceedings under section 34 of the Act with a notice dated 26th March, 1954 which was served on the petitioner on 29th March, 1954. The assessment for 1945-46 was completed by the Income-tax Officer on 5th March, 1955 under section 34 read with section 23 (4). The assessments for 1946-47 and 1947-48 were without recourse to section 34. The assessment for 1946-47 was completed under section 23 (3) on 5th March, 1955. The assessment for 1947-48, which was under section 23 (4) was completed on 26th March, 1956.

Against these assessment orders the petitioner preferred appeals successively to the Appellate Assistant Commissioner and to the Tribunal. The main plea of the petitioner in those appeals was that the remittances from Ceylon in the relevant years which stood in his name did not represent his monies. The plea was rejected. The quantum of the tax imposed by the Department was, however, reduced to some extent by the Tribunal. Not satisfied with that, the petitioner asked for a reference under section 66 (1). Those applications were rejected by the Tribunal. The petitions filed by the petitioner under section 66 (2) of the Act are still pending disposal in this Court.

In due course the Income-tax Officer issued certificates under section 46 (2) of the Act to the Collector to recover the arrears of the assessed tax not only for these three years but also for the assessment year 1951-52. The total shown in these certificates was Rs. 1,01,081. The Collector took proceedings under the Revenue Recovery Act and had the sale of the petitioner's land proclaimed in the District Gazette dated 18th October, 1958 to recover that sum of Rs. 1,01,081 as if it were an arrear of land revenue. It was common ground that that was not the sum due on that date. The respondents conceded that even on 26th September, 1958 it was only a sum of Rs. 64,994 that was due from the petitioner. The respondents admitted that though the reduction of the taxes under the orders of the Tribunal was in due course notified to the Collector, he did not take either that reduction or the collection of Rs. 10,000 into account when he notified in the Gazette that a sum of Rs. 1,01,081 was still due. The sale was held and the attached properties of the petitioner fetched Rs. 24,405. The sale, however, has not yet been confirmed and the objections preferred by the petitioner to the Collector under the provisions of the Revenue Recovery Act have yet to be disposed of.

The petitioner preferred W.P. No. 1011 of 1958 for the issue of a writ of prohibition to restrain the proceedings to recover the arrears of tax claimed from him and eventually obtained a rule *nisi* on 12th March, 1959. On 22nd June, 1960 the petitioner filed C.M.P. No. 4306 of 1960, seeking permission to raise additional grounds to sustain the relief asked for in W.P. No 1011 of 1958. It was at this stage that the validity of the assessments themselves for the three assessment years 1945-46, 1946-47 and 1947-48 was challenged, mainly on the ground that they were barred by limitation on the respective dates of assessment 5th March, 1955 and 26th March, 1956. The petitioner followed that up by presenting W.P. Nos. 1268 to 1270 of 1960 in which he asked for the issue of writs of *certiorari* to set aside the orders of assessment themselves in each of the three years. *Rule nisi* was issued in each of these petitions only on 25th January, 1961, but since these affidavits and counter-affidavits on which the parties relied were all on record in W.P. No. 1011 of 1958, the hearing was proceeded with with the consent of both parties, and all the petitions were heard together. The further grounds raised in C.M.P. No. 4306 of 1960 were allowed to be argued. That petition will stand allowed.

Despite the range of the affidavits and counter-affidavits, the scope of the arguments was comparatively limited, and we shall confine ourselves to the points specifically pressed for adjudication during the arguments at the final hearing.

The learned counsel for the Department urged that the validity of the assessments should not be investigated in these proceedings under Article 226 of the Constitution. He pointed out that the petitioner had availed himself of the remedies open to him under the Income-tax Act, and the proceedings under section 66 (2) were pending disposal even now in this Court itself. It was common ground that the plea of limitation, which is now the main basis for the challenge to the validity of the assessments made by the Income-tax Officer was never put forward at any stage of the assessment proceedings and that there was no adjudication of that question by the Tribunal. The learned counsel submitted that even if a reference was ordered under section 66 (2), the question of limitation could not arise as a question of law on the orders of the Tribunal. The further submission was that the failure of the petitioner to take this plea in the statutory proceedings open to him and availed

of by him disabled him from seeking adjudication of that issue in these proceedings under Article 226 of the Constitution.

It is true that a writ of *certiorari* is a discretionary relief and normally a writ of *certiorari* will not be viewed by this Court as a parallel remedy which an assessee can seek simultaneously with the statutory remedies open to him under the Income-tax Act. That the petitioner as an assessee failed to take a plea open to him in the assessment proceedings and in the appeals that he preferred, cannot under normal circumstances, place him in a better position to seek the discretionary relief of a writ of *certiorari*. In the present case the petitioner asked also for a writ of prohibition (W.P. No. 1011 of 1958). If any order of assessment was without jurisdiction and if any portion of that order is still operative in the sense that anything is sought to be recovered from the petitioner under such an order of assessment passed wholly without jurisdiction or in excess of the jurisdiction vested in the Income-tax Officer, the issue of a writ of prohibition would not be a matter of discretion, and in that respect it differs from the discretionary relief of a writ of *certiorari*. In the circumstances of this case we are of opinion that we should not refuse to investigate the question whether the assessments for all or any of the three years in question were invalid.

Section 34 (3) which prescribed the period within which the assessment should be completed by the Income-tax Officer directs :

" No order of assessment or re-assessment, other than an order of assessment under section 23 to which clause (*c*) of sub-section (1) of section 28 applies or an order of assessment or re-assessment in cases falling within clause (*a*) of sub-section (1) or sub-section (1-A) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable." (*We shall omit the provisos*).

With reference to the assessment for 1945-46 the position, it should be remembered, was that the Income-tax Officer ignored the return filed by the petitioner on 20th March, 1954 and issued a notice under section 34 (1) on 26th March, 1954. If the initiation of assessment proceedings under section 34 was valid, it could not be denied that the completion of the assessment on 5th March, 1955, within one year of the notice served on 29th March, 1954, which itself was within the period of 8 years allowed by section 34 (3) was not barred by limitation. The contention of the petitioner was that the initiation of proceedings under section 34 (1) was not valid, and that therefore only the four year period of limitation applied.

It should be taken as well settled now that where an assessee has filed his return before the completion of assessment within the period of limitation allowed by law, proceedings cannot be commenced by the assessing authority under section 34 of the Act : see *Muthiah Thevar* v. *Commissioner of Income-tax*[1], where the law laid down by the Supreme Court in *Commissioner of Income-tax* v. *Ranchhoddas Karsondas*[2], was applied. Section 22 (3), it should be remembered, permits a return to be filed at any time before the assessment is made, even if no return was filed in response either to the general notice under section 22 (1), or any individual notice under section 22 (2). The learned counsel for the Department urged that section 22 (3) carried its own limitation. In our opinion his submission was correct, that what section 22 (3) permitted the assessee was to file his return at any time before the assessment could be lawfully made. The normal period of limitation, barring the exceptions for which section 34 (3) provides, for making an assessment being four years, the contention of the learned counsel for the Department was that the return filed after a period of four years could not lead to any lawful assessment, and it should therefore be treated as *non est* in law. We agree that the principle laid down in *Commissioner of Income-tax, Bombay* v. *Ranchhoddas Karsondas*[2], and applied by this Court in *Muthiah Thevar* v. *Commissioner of Income-tax*[1], cannot be extended to this case, where the return for 1945-46 was filed by the assessee, the petitioner, after the expiry of the period of four years. No assessment could have been validly made on the return filed on 20th March, 1954. After the expiry of four years from the

1. (1960) 39 I.T.R. 107. 2. (1959) 36 I.T.R. 569.

end of the assessment year 1945-46 no assessment could have been made on the petitioner without recourse to section 34 (1) and recourse could be had to section 34 (1) only on the ground that no return had been filed, that is, that no return had been filed before the assessment could be lawfully completed without recourse to section 34 (1). The return filed by the petitioner on 20th March, 1954 did not, in the circumstances of this case, vitiate the notice issued under section 34 (1) on 26th March, 1954. We uphold the contention of the learned counsel for the Department, that the initiation and completion of the assessment proceedings for 1945-46 under section 34 were valid.

The assessment for 1946-47 was under section 23 (3) and without recourse to section 34. The order of assessment did not show that the conduct of the assessee attracted the penal provisions of section 28 (1) (*c*). No action was taken against the assessee under section 28 (1) (*c*) before or after the assessment was completed on 5th March, 1955. The limitation of four years prescribed by section 34 (3) is abrogated if (1) in an assessment under section 23, the provisions of section 28 (1) (*c*) applied or (2) the assessment is in a case falling within section 34 (1) (*a*). We can leave out of account the third category for which section 34 (3) provided, cases falling under sub-section (1-A) of section 34. The petitioner's was not such a case. We have said that the assessment in the case of the petitioner was under section 23 but that it was not one which attracted section 28 (1) (*c*). Factually no action was taken under section 34 and it was not a case of assessment or reassessment under section 34. The learned counsel for the Department urged that the Income-tax Officer would have been entitled to treat the return filed by the petitioner on 20th March, 1954 as *non est* in law and to issue a notice under section 34 (1) (*a*) on the ground, that the petitioner had not filed any valid return for the assessment year 1946-47. His further submission was that that satisfied the requirement of section 34 (3), and that it was a case falling within section 34 (1) (*a*) as that expression has been used in section 34 (3), though factually the provisions of section 34 (1) (*a*) were never applied and the prescribed notice was never issued. In our opinion the statutory expression " an order of assessment in cases falling under section 34 (1) (*a*) " cannot be construed to mean an order of assessment in a case which could have been dealt with under section 34 (1) (*a*) but which was not so dealt with. It is well settled that the issue of the prescribed notice is a condition precedent to the assumption of jurisdiction vested by section 34 (1), and where such notice was never issued, it cannot be viewed as a " case falling within section 34 (1) (*a*) ", within the scope of section 34 (3). Since the petitioner's case did not come within the scope of either of the exceptions for which section 34 (3) provided—it was not a case to which section 28 (1) (*c*) applied, and it was not a case falling within section 34 (1) (*a*)—the four year period of limitation alone applied. The Income-tax Officer had no jurisdiction to assess the petitioner after the expiry of the four year period. The order of assessment made on 5th March, 1955 was wholly without jurisdiction and was therefore invalid.

The assessment order of the Income-tax Officer for 1947-48 in express terms recorded that proceedings under section 28 (1) (*c*) were initiated with a notice issued to the petitioner. There was an express finding in the order of assessment itself, that there had been a concealment of the income, and concealment of income is conduct which attracts the application of section 28 (1) (*c*). What section 34 (3) exempts is an order of assessment under section 23 to which section 28 (1) (*c*) applies. That requirement would appear to be satisfied in this case. The learned counsel for the petitioner relied on *Mir Suba Hari Bhakta* v. *Income-tax Officer*[1], and contended that the order of assessment itself should record in express terms that the requirements of section 34 (3) were satisfied, and that it was a case of assessment to which section 28(1) (*c*) applied, and in the absence of such an express finding, the bar of limitation prescribed by section 34(3) should apply. The observations at pages 622 and 623 of the report were with reference to the order of assessment in that case where the Income-tax Officer recorded an express finding that the order was one

1. (1960) 39 I.T.R. 617.

to which the provisions of section 28 (1) (*c*) did apply. The learned Judges pointed out at page 623 that it was a finding which he had jurisdiction to record. We are unable to look upon that as authority that unless there was such an express finding, the extended period of limitation for which secion 34 (3) provided would not come into play. Section 34 (3) does not require that proceedings under section 28 (1) (*c*) should have been finalised and a penalty imposed as a condition precedent to assessment being completed beyond the period of four years. Obviously that would be impossible, because proceedings under section 28 (1) (*c*) initiated no doubt before the assessment is completed can themselves be completed only after the assessment has been finalised. The normal practice also is not to rush into an order under section 28 (1) (*c*) on the completion of the proceedings of assessment by the Income-tax Officer himself, but after the issue of notice under section 28 (1) (*c*) to wait until the assessment becomes final after the appeals, if any. If, as in this case, there was an express finding, that there was concealment of income, that would appear to satisfy the requirements of section 34 (3) that it is a case of assessment under section 23 to which section 28 (1) (*c*) would apply. As we said in this case there was the additional factor, that a notice under section 28 (1) (*c*) was issued to the petitioner antecedent to the completion of the assessment proceedings by the Income-tax Officer.

The learned counsel for the petitioner urged that the mere issue of notice was not enough, and that the requirement of section 28 (3) should be satisfied before section 34 (3) was brought into play. We are unable to accept this contention. Section 28 (3) comes into play where an order of penalty has to be passed under section 28 (1). That stage is yet to come. We have already pointed out that section 34 (3) does not and cannot possibly require an order of penalty being passed under section 28 (1) (*c*) before an order of assessment is made.

The further contention of the learned counsel for the petitioner was that the Income-tax Officer could not assume or exercise the power to make an assessment after the expiry of four years even under the enabling provisions of section 34 (3), in the absence of a specific notice issued to the assessee to show cause why the assessment should not be made after the period of four years on any of the grounds mentioned in section 34 (3).

We are unable to see any scope in the language of section 34 (3) for such a contention. In the assessment proceedings the assessee should certainly be given an opportunity to show cause why the assessment should not be made. If, for instance, concealment of income is one of the findings in the year of assessment, the assessee is entitled to an opportunity to show that there had been no concealment of income. If such concealment of income is established, that would attract the application of section 28 (1) (*c*) though the order of penalty itself would be in proceedings independent of the order of assessmet. Before a penalty is imposed the assessee is entitled to a notice, and he is also entitled to an opportunity to show cause why the penalty should not be imposed. But we are unable to see any basis, statutory or otherwise, for the contention, that before section 34 (3) is invoked to abrogate the normal rule of limitation of four years, the assessee should be given a notice in express terms asking him to show cause why the assessment should not be made beyond the period of four years. That the assessee in this case had availed himself of the opportunity of convincing the Income-tax Officer that the assessee did not conceal any income did not admit of any doubt. No principle of natural justice was violated when the Income-tax Officer recorded his finding that there had been a concealment of income. Once that finding was there, the legal consequences followed, one of them being that it would attract the provisions of section 28 (1) (*c*).

We hold that with reference to the assessment for 1947-48 the petitioner's plea that it was barred by limitation, fails. The jurisdiction of the Income-tax Officer and the validity of the order for 1947-48 were not challenged on any other ground.

We shall next consider the question whether apart from the validity of the assessment orders, the recovery proceedings were in any way vitiated, and whether on that ground alone the petitioner is entitled to a writ of prohibition in W.P. No. 1011 of 1958.

We have already pointed out that while the amount of arrears actually due was only Rs. 64,994 proceedings were taken by thr Collector under the Revenue Recovery Act to recover a sum of Rs. 1,01,081 by the sale of the petitioner's lands. No doubt the certificates issued under section 46 (2) showed Rs. 1,01,081 as due. The fact that subsequently the arrears were reduced below that figure did not vitiate the certificates themselves. But obviously the Collector has jurisdiction even on the basis of these certificates to recover only the amount actually due. That was the view taken by one of us in *George* v. *Income-tax Officer*[1]. Section 27 of the Revenue Recovery Act (II of 1864) requires that the notice of attachment should specify the arrears due. That is what gives jurisdiction to the Collector to bring the attached property subsequently to sale under section 36. If the attachment was vitiated, the subsequent sale also would be vitiated. It should be needless to point out that under the Revenue Recovery Act the Collector has no jurisdiction either to attach or to bring to sale properties to recover a sum higher than what was legally due on the date of the notice of attachment; and in this case the notification in the Gazette obviously proceeded on the basis that Rs. 1,01,081 was still due when it was not. That vitiated the subsequent sale.

The learned counsel for the Department could not challenge the position, that the sale in this case was vitiated but he urged that the sale could be set aside by the Collector himself in proceedings under the Revenue Recovery Act, and he pointed out that the petitioner had availed himself of the remedy provided by section 38 of that Act and had applied to the Collector to set aside the sale. That application is still pending.

Once again we have to emphasise the feature, that what has been asked for in W.P. No. 1011 of 1958 is a writ of prohibition. That an alternative remedy exists is by itself no bar to the assumption of jurisdiction by this Court to issue a writ of prohibition, once an absence of jurisdiction or an excess of jurisdiction is established. In this case the Collector had jurisdiction to recover the actual amount of arrears due on the certificates issued under section 46 (2) of the Act. But his jurisdiction was limited to the realisation of the actual arrears by enforcing the provisions of the Revenue Recovery Act. When he specified a higher sum than was actually due as recoverable, the subsequent proceedings under the Revenue Recovery Act were really without jurisdiction and a writ of prohibition could issue. If for instance, before the sale had taken place the petitioner had asked for a writ of prohibition it would have been issued. The mere fact that in this case the sale has been held really does not affect the position. There is still something which the Collector has to do to confirm the sale held without jurisdiction. That can be prevented by the issue of a writ of prohibition despite the pendency of the application before him under section 38 of the Revenue Recovery Act. There is one other feature. Though we have referred to Rs. 64,994 as due on the date of the attachment, the position that now emerges is that the assessed tax for 1946-47 cannot be recovered because the order of assessment itself was one passed without jurisdiction.

On the short ground that a higher sum was sought to be recovered under the Reveune Recovery Act than what was lawfully due, the petitioner would be entitled to a writ of prohibition restraining the Revenue Authorities from continuing the recovery proceedings under the Revenue Recovery Act.

The learned counsel for the petitioner urged that the certificates issued under section 46 (2) had become inoperative, and that without the issue of fresh certificates under section 46 (2) the Collector would have no jurisdiction to recover anything from the assessee. It is not really necessary for us to express any concluded opinion of ours on the question. We have already pointed out that in *George* v. *Officer*[1], one of us has taken a different view. The learned counsel for the petitioner

1. (1958) 1 M.L.J. 90 : (1958) 33 I.T.R. 22.

relied on *Seghu Buchiah Setty* v. *Income-tax Officer Kolar Circle*[1], where the learned Judges relied upon *Metropolitan Structural Works Ltd.* v. *Union of India*[2]. It is not necessary for us to express our dissent from the view taken by the learned Judges of the Mysore High Court in *Seghu Buchiah Setty* v. *Income-tax Officer, Kolar Circle*[1]. We shall permit ourselves to point out that neither *George* v. *Income-tax Officer*[3], nor *Ladhuram Taparia* v. *D. K. Ghosh*[4], where the learned Judges of the Calcutta High Court explained the scope of their earlier decision in *Metropolitan Structural Works Ltd.* v. *Union of India*[2] appears to have been brought to the notice of the learned Judges of the Mysore High Court.

We have held that the order of assessment for 1946-47 was without jurisdiction. On that ground by itself the petitioner would be entitled to a writ of prohibition to restrain the recovery of any portion of the tax assessed for 1946-47. Where the recovery is impossible we cannot see any objection to the order of assessment itself being set aside by the issue of a writ of *certiorari*, despite what we have referred to earlier that a writ of *certiorari* is a discretionary relief. As has been repeatedly pointed out a writ of prohibition will lie when the proceedings are to any extent pending; and a writ of *certiorari* will lie for quashing the proceedings after they have terminated in a final decision—*See* the observation Venkatarama Ayyar, J. in *Hari Voshnu* v. *Ahmad Ishaque*[5]. In this case as the petitioner is entitled to a writ of prohibition with reference to the tax assessed for 1946-47, we have decided to exercise our discretion in favour of granting a writ of *certiorari* as well.

We have upheld the validity of the assessment for the other two years 1945-46 and 1947-48. The *rule nisi* in W.P. Nos. 1268 and 1269 of 1960 will stand discharged and these petitions will be dismissed but without any order as to costs.

The *rule nisi* in W.P. No. 1270 of 1960 will be confirmed and a writ of *certiorari* will issue to set aside the order of assessment passed by the Income-tax Officer for the assessment year 1946-47 and the subsequent orders of the appellate authorities.

A writ of prohibition will issue in W.P. No 1011 of 1958 to restrain further proceedings under the Revenue Recovery Act on the basis, that all proceedings taken subseuquent to the notification in the District Gazette on 18th October, 1958, were in excess of the jurisdiction conferred on the revenue authorities by the Revenue Recovery Act.

Since neither side has wholly succeeded we direct that the parties bear their respective costs.

Before we completed the judgment, learned counsel for the Department brought to our notice the fact that the applications filed by the petitioner-assessee under section 66 (2) of the Act—T.C. Ps. 12, 13 and 14 of 1960, were disposed of on 28th November, 1960, itself. In those cases the Court refused to direct a reference on the question whether the assessments in any of the years was barred by limitation. This feature, however, as we stated earlier in the judgment that proceedings under section 66 (2) of the Act were still pending would in no way affect the reasoning in our judgment and our conclusions.

W. P. Nos. 1268 *and* 1269 *of* 1960, *dismissed.*

W. P. Nos. 1011 *of* 1958 *and* 1270 *of* 1960, *allowed.*

P.R.N.

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1. (1960) 38 I.T.R. 204.
2. (1955) 28 I.T.R. 432.
3. (1958) 1 M.L.J. 90 : (1958) 33 I.T.R. 22.
4. (1958) 33 I.T.R. 407.
5. (1955) 1 M.L.J. 157 : (1955) S.C.J. 267 : A.I.R. 1955 S.C. 233 at 241 (S.C.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

Muniammal and others .. *Petitioners**

v.

Thulakkana Naicker and another .. *Respondents.*

Execution—Revival—Principle of—Applicability—Test—Application by decree-holder purchaser for delivery of possession—Dismissal on ground of obstruction to delivery and injunction in suit by obstructors—If "final order on merits"—Subsequent application for delivery after 30 days—Whether revival of prior one or fresh application—Limitation Act (IX of 1908), Article 167—Applicability.

The principle of revival of an earlier execution petition can have no application where the prior application was dismissed for the default of the decree-holder but the principle of revival would apply where the earlier application was dismissed not owing to the default of the decree-holder but on account of circumstances over which he had no control.

Where an application for delivery of possession by a decree-holder purchaser is dismissed for no default of the decree-holder but on account of obstruction to delivery and an injunction order passed in a suit filed by the obstructors in a suit against the decree-holder, a subsequent application by him has to be regarded as an application for revival of the earlier application and the dismissal of the earlier application cannot be held to be a final order so as to preclude a subsequent application made beyond thirty days after the obsttruction.

Abdul Azim Sahib v. *Chokkan Chettiar*, (1935) 69 M.L.J. 821 (F.B.) ; *Sundaramma* v. *Abdul Khadar*, (1932) 64 M.L.J. 664 (F.B.), distinguished.

Kotayya v. *Narayana*, (1943) 2 M.L.J. 450, relied on.

Petition under section 115 of Act (V of 1908), praying the High Court to revise the Order of the City Civil Court, Madras (Second Assistant Judge) dated 3rd March, 1960 and made in E.P. No. 137 of 1960 in O.S. No. 2350 of 1957.

S. Sitarama Ayyar, for Petitioners.

K. Shanmugham, for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners were the obstructors, against whom an order has been made by the Second Assistant Judge for removal of the obstruction. It would appear that, originally E.P. No. 543 of 1959 was filed for delivery of possession. Obstruction was caused by these petitioners, and E.A. No. 1639 of 1959 was filed for the removal of the obstruction. This application was made on 24th August, 1959. In the meantime, however, these obstructors had apparently filed a suit, O.S. No. 2408 of 1959 for a declaration of their title to the property and for an injunction restraining the decree-holder from executing the order for delivery that he had obtained in E.A. No. 1639 of 1959 referred to above. It is stated, though it is not borne out by the records, that an order of interim injunction was made towards the end of August, 1959. That order appears to have been finally vacated only on 23rd December, 1959, when the suit filed by the obstructors was itself dismissed. In the meantime, however, E.P. No. 543 of 1959, which was the execution petition for delivery of the properties filed by the decree-holder, had been dismissed on 10th November, 1959.

Subsequently, the decree-holder filed a fresh execution petition No. 137 of 1960, seeking delivery of possession after removal of the obstruction. This was resisted by the obstructors on the ground that this application had been made more than 30 days after the obstruction, and that, further E.P. No. 543 of 1959 itself having been dismissed, the present petition was not maintainable. The learned Second Assistant Judge examined the question and came to the conclusion that, because of the injunction order that had been issued against the decree-holder, he had been prevented from taking steps within the period of 30 days and that there was no question of the prior execution application having been dismissed. Though it is not quite clear, the learned Second Assistant Judge seems to have

* C.R.P. No. 744 of 1960. 25th April, 1961. (5th Vaisakha, 1883, Saka.)

taken the view that the previous petition was still pending and E.P. No. 137 of 1960 was not a fresh execution petition, but was a continuation of the prior petition, which must be deemed to be pending. He accordingly directed delivery of possession after removal of the obstruction. It is against this order that the present revision petition has been filed.

The same contentions have been pressed before me. From what I have stated earlier, it is quite clear that on the obstruction caused by the petitioner to delivery in E.P. No. 543 of 1959, an application (E.A. No. 1693 of 1959) for removal of obstruction was in fact filed within 30 days. Learned counsel for the petitioners, however, urged that, whatever the reasons might be E.P. No. 543 of 1959 was itself dismissed for default. He, no doubt, concedes that, on the date on which that petition was dismissed, the interim injunction that had been granted by the Court against the decree-holder was operative and that the decree-holder could not take any steps in proceeding with the application that he had made. Nevertheless, according to him, since the fact that an interim injunction was in force against the decree-holder was not brought to the notice of the Court, the order of the Court dismissing the petition for default was final, and that would mean that the execution application for the removal of obstruction also stood dismissed. The question is whether this view is correct.

Reliance has been placed upon certain observations in *Sundaramma* v. *Abdul Khadar*[1]. There it was laid that the principle of revival of an earlier execution petition could not apply as the prior application was dismissed for the default of the decree-holder and the revival thereby would apply only if the earlier petition was dismissed, not owing to the default of the decree-holder, but to other causes over which the decree-holder had no control and which had since been removed. That was a case where, pending certain execution proceedings on foot of a mortgage decree the mortgage itself was found to be invalid and not binding in another suit. Notwithstanding such a finding in another suit, there was no doubt that the decree on foot of the mortgage was not immediately affected. Nevertheless, the decree-holder did not take the necessary steps for proceeding with this execution petition and his petition was dismissed for default. The learned Judge (Sundaram Chetty, J.) in dealing with this point, observed : (page 613)

"It may be contended with some show of reason that, even in the absence of an injunction restraining the sale of the properties in execution of the mortgage decree. . . . . . the declaration of the invalidity of that mortgage would be an obstacle to pursue the execution of the mortgage decree by seeking to sell the mortgaged properties. I am not, however, dealing with that point."

It is obvious that the mere fact that some cloud had been cast on that mortgage and its validity in another suit, would not have affected the executability of the decree which had been obtained on the mortgage. Apparently, the decree-holder thought that it might, and that is why he did not proceed further with the execution of the mortgage decree and allowed his execution application to be dismissed for default. The fact that the decree-holder had not been restrained in any manner from proceeding with his execution application was commented upon as definitely establishing that the dismissal of the execution petition was for deault of the decree-holder. Learned counsel refers to the decision in *Abdul Azim Sahib* v. *Chokkan Chettiar*,[2], where Ramesam, J., observed that, where an application is made for the removal of obstruction more than 30 days after the date of obstruction, such a petition was barred by limitation, and as against the obstructor in such a case, the decree-holder's remedy is only by way of regular suit. This decision would be relevant if it is held that a second execution petition for obtaining possession after removal of obstruction would not lie. But, if such a petition would lie, then, the applicability of the above decision is somewhat doubtful. As I have pointed out, in this case, an application for the removal of obstruction was in fact filed within the time stipulated by law. The only question that arises here is whether that petition was disposed of properly, so that the same relief could not be asked by way of another petition.

1. (1932) 64 M.L.J. 664: I.L.R. 56 Mad. 490 (F.B.).
2. (1935) 69 M.L.J. 821 (F.B.).

In *Kotayya* v. *Narayana*[1], Horwill, J. held that if there was a default in the prosecution of an application for delivery on account of some fault on the part of the auction purchaser, then, the dismissal of the application is a final order and definitely disposes of his application. If, however, the petition had been closed and there had been no default by the auction-purchaser, then, the petition for delivery must be deemed to be pending. The learned Judge referred to earlier cases on the point and came to the conclusion that whether or not there was a default on the part of the decree-holder was the matter upon which would defend the finality or otherwise of the order made upon the execution petition. The learned Judge also pointed that a decree-holder is not bound to apply for removal of obstruction and may put in a fresh application for delivery. On the authority of this decision, even assuming that the earlier execution petition was dismissed, it does not appear to be incompetent for the decree-holder to apply afresh in E.P. No. 137 of 1960 for delivery free of obstruction.

As I have pointed out, there was an injunction order against the decree-holder, and, on the date on which the execution petition was dismissed, that injunction was operative. It was not by reason of any default on the part of the decree-holder that the petition can be said to have been dismissed. Factually, there was no default on his part. The mere circumstance that the existence of the interim injunction was not brought to the notice of the Court which passed the order cannot negative the fact that there was such an injunction order operative against the decree-holder. In that view, I would hold that the order of dismissal of E.P. No. 543 and E.A. No. 1639 of 1959 was not based upon any default on the part of the decree-holder, and that E.P. No. 137 of 1960 can be regarded as an application for revival of those execution proceedings. That, I feel, is the proper conclusion to be reached on a consideration of the facts in this case and on the basis of the decisions I have referred to. The petition is accordingly dismissed with costs.

Time for delivery : Two months.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

R. Ganapathi Pillai .. *Petitioner**

v.

P.A. Irudayasamy Nadar .. *Respondent.*

Contract Act (IX of 1872), section 70—Claim for compensation on quantum meruit *for work done—Basis of—Express pleading—If necessary.*

Relief under section 70 of the Contract Act can be given even if the party seeking the relief has based his claim on an express agreement in that regard and has failed to establish the same. The basis of the statutory relief is that where a party to a contract has rendered service to another, not intending to do so gratuitously and the other person had obtained some benefit, the former is entitled to compensation for the value of the services rendered by him.

Sathiavel Pillai v. *Siwaswami Pillai,* A.I.R. 1933 Mad. 344 and *Ratanlal Hiralal* v. *Chandradutt,* A.I.R. 1951 Nag. 431, doubted.

Subramanyam v. *Thayappa,* (1961) 2 S.C.J. 191, referred to.

Petition under section 25 of Act (IX of 1887) praying the High Court to revise the Decree of the Court of the Subordinate Judge of Thanjavur, dated 25th April, 1959 and passed in S.C.S. No. 150 of 1958.

T.R. Srinivasan, for Petitioner.

G. Ramasami and *S.M. Subramanyam,* for Respondent.

The Court delivered the following

JUDGMENT :—The petitioner is the plaintiff. He sued to recover an amount which he claimed was due to him in respect of certain constructions which he had

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1. (1943) 2 M.L.J. 450.

* C.R.P. No. 230 of 1960. 14th April, 1961.
(24th Chaitra, 1883, Saka.)

put up on the premises leased to him by the defendant-respondent. The premises is a mill and it is not denied by the defendant that he had agreed to put up certain additional constructions thereon. Subsequently, however, the plaintiff was permitted by the defendant to put up the constructions at his own expense on the promise that he would be reimbursed therefor. When finally that amount was not so paid, the plaintiff brought the matter to the Court. In the plaint, he specifically pleaded an agreement whereunder the defendant had agreed to pay the value of these structures. The learned Subordinante Judge, while he found against the contention of the defendant that it was he himself who had put up these contructions, came to the conclusion that the plaintiff had failed to prove the specific agreement set up by him, and that agreement failing, he proceeded to dismiss the suit. It is against that Judgment that the present revision petition has been filed.

On the factum of who put up the additional structures, I have no doubt whatsoever that the learned Subordinate Judge came to the correct conclusion that it was the plaintiff who expended the moneys therefor and put up these constructions. It is not necessary to examine whether the alleged oral agreement specifically relied upon by the plaintiff, whereunder, according to him, the defendant had agreed to reimburse him for the expenses incurred in this connection has been established. It seems to me that having regard to all the circumstances of the case, that version is most likely to be true. I may, however, refer to certain features which have been relied upon on behalf of the respondent to suggest that this promise of reimbrusement is not substantiated. It is seen that the agreement to lease the premises was entered into on 9th March, 1958 and in pursuance of this agreement an advance of Rs. 500 was paid by the plaintiff to the defendant. It also appears that subsequently on 11th June, 1958, the balance of the advance of Rs. 1,500 was paid. Sometime later, a cheque for Rs. 60 and odd was sent by the plaintiff to the defendant towards expenses for the purchase of stamps. Learned counsel for the respondent points out that if the version about the agreement to reimburse the plaintiff is true, here were at least two occasions on which the plaintiff could have set-off his claim of Rs. 700 against the amounts which he subsequently paid to the defendant. On the other side, it is contended that by 11th June, 1958, when the balance of the advance was so paid, the work had not been completed and therefore there was no proper occasion to make the necessary adjustment. The subsequent payment of Rs. 60. 97 nP. which was intended to meet the expenses for the purchase of stamps, could not be taken advantage of for the adjustment of such a large sum of Rs. 700. These arguments, therefore on the part of the respondent do not affect the conclusion which the learned Subordinate Judge reached on the question of the genuineness of the oral agreement pleaded.

Even assuming that the oral evidence was not deemed to be satisfactory, the plaintiff's claim appears to have been based on another ground, that is, under section 70 of the Constract Act. According to the learned counsel for the petitioner-plaintiff, here is a case where the parties had agreed that certain additions to the lease premises were necessary. The defendant-lessor agreed to put up these constructions, though later he was unable to spare the time or the money necessary for the purpose. In order to effectuate the lease transaction itself, these additional constructions were necessary, and if the plaintiff put up these constructions, the benefit of which would subsequently accrue to the defendant, the owner of the premises, here is clearly a case where the plaintiff is entitled to be reimbursed as these constructions were not put up gratuitiously by him. All the conditions necessary to attract section 70 of the Contract Act would appear to exist in this case. On the other hand, however, it is argued for the respondent that unless the plaintiff comes to Court and pleads specifically that he is entitled to the relief under section 70 of the Contract Act, he cannot be granted a decree. Several cases have been cited, but one of the important cases which clearly sets out what the necessary conditions are which attract the application of section 70 is reported in *Nalini Ranjan Guha* v. *Union of India*[1], where it is laid down that the antecedent request pursuant to which the work was

1. (1954) 93 Cal.L.J. 373.

done forms no part of the cause of action under section 70 of the Indian Contract Act; that is to say, that it does not even appear to be necessary that there should be a request proceeding from one party to the other before the work was ever undertaken or done to enable resort to section 70 of the Contract Act. This would meet the argument that the plaintiff had failed to establish the oral agreement with regard to the reimbursement demanded.

Sathiavel Pillai v. *Sivasami Pillai*[1], has been relied upon. This case also laid down that where the suit was laid on the basis of an alleged contract and the contract was not proved, the Court has no jurisdiction to grant the relief on the principle of *quantum meruit*, unless it has been asked for alternatively. In another case *Ratanlal Hiralal* v. *Chandradutt*[2], a principle somewhat similar has been laid down to the effect that if an express agreement has been pleaded and that fails, relief cannot be granted on the basis of an implied agreement which has not been pleaded. These cases have been relied upon by the respondent for the argument that unless the plaint specifically bases its claim to relief under section 70 of the Indian Contract Act, the Court should not grant that relief.

While, no doubt, these decisions do appear to support such a view, a recent decision of the Supreme Court in *Subramanyam* v. *Thayappa*[3], would suggest that the reasoning underlying the above decisions cannot any longer be regarded as applicable to this class of cases. In this case, their Lordships say :

"If a party to a contract has rendered service to the other not intending to do so gratuitously and the other person has obtained some benefit, the former is entitled to compensation for the value of the services rendered by him. Evidently, the respondent made additional constructions to the building and they were not done gratuitously. He was therefore entitled to receive compensation for the work done which was not covered by the agreement. The respondent claimed under an oral agreement compensation at prevailing market rates for work done by him ; even if he had failed to prove an express agreement in that behalf, the Court may still awatd him compensation under section 70 of the Contract Act. By awarding a decree for compensation under the Statute and not under, the oral contract pleaded, there was in the circumstances of this case no substantial departure from the claim made by the respondent."

It seems to me that the facts of the present case appear to be almost on all fours with those of the decision, in so far as they can be gathered from the Short Notes of that case[3]. In addition, it may also be pointed out that though cryptically worded, there is at least one sentence in the plaint which would suggest that relief under section 70 of the Contract Act was also prayed for.

In the result, the Judgment and Decree of the lower Court are set aside. The suit will stand decreed with costs throughout.

R.M. ——— *Petition allowed and suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

Swami Nellaippar Sri Kanthimathi Amman Devasthanam, Tirunelveli, through its Executive Officer .. *Appellant**

v.

Sri Navaneethakrishnaswami Temple, Veerakeralampudur, through its Receiver and Trustee Sri N.H.M. Pandian .. *Respondent.*

Madras Hindu Religious Endowments Act (II of 1957), *section* 57 *and Madras Hindu Religious and Charitable Endowments Act (XIX of* 1951), *sections* 58, 62 *and* 103—*Executive officer under scheme framed for a temple by Commissioner—Loan raised with sanction of Board—Power to keep alive by part payment or acknowledgment—If abrogated by interim appointment as receiver of hereditary trustee in his suit to set aside order framing scheme—Suit against executive officer for recovery of loan—If property laid.*

The order of the Commissioner framing a scheme for a temple and appointing an Executive Officer under section 57 of Madras Act (II of 1927) will be deemed by virtue of section 103 of Madras Act

1. A.I.R. 1933 Mad. 344.
2. A.I.R. 1951 Nag. 431.
3. (1961) 1 M.L.J. (N.R.C.) 30 since reported in full in (1961) 2 S.C.J. 191.

* S.A. No. 415 of 1959.

2nd December, 1960.
(11th Agrahavana, 1882, Saka.)

(XIX of 1951) to have been made under section 58 thereof by the appropriate authority. Section 62 of the later Act gives a right of suit to the aggrieved party just as section 57 (7) of the 1927 Act empowered the hereditary trustee to file a suit for setting aside the order framing the scheme. Section 62 of the 1951 Act prohibits any stay of the order of the Commissioner framing the scheme till the disposal of the suit. What the Act aims at is to postpone whatever relief the Court is called upon to grant to the stage of final determination of the suit. The civil Court's power under Order 40, Civil Procedure Code, has to yield to the statutory prohibition contained in Act XIX of 1951. The interim appointment as receiver of the hereditary trustee in his suit to set aside the order framing the scheme, with nothing more, cannot operate as stay of any portion of the scheme. Such receiver did not derive any authority to interfere with the Executive Officer's management or powers and duties.

Where the Board as the proper authority had authorised the Executive Officer obtaining a loan, the Executive Officer empowered to receive money due to the temple and make disbursements could make a part payment in discharge of the loan incurred to prevent its becoming barred by limitation.

A suit against the Executive Officer for recovery of the loan is properly filed although at a later stage the hereditary trustee is brought on record. It cannot be said that the suit must be deemed to have been filed only when the hereditary trustee was brought on record.

Appeal against the Decree of the District Court, Tirunelveli, in Appeal Suit No. 88 of 1958, preferred against the Decree of the Court of the District Munsif of Tirunelveli in Original Suit No. 36 of 1957.

B. V. Viswanatha Iyer and *R. G. Rajan*, for Appellant.

M. Natesan and *N. Ramachandran*, for Respondent.

The Court delivered the following

JUDGMENT.—The appellant, Sri Nellaippar Devasthanam, Tirunelveli, sued as plaintiff to recover an amount due on a promissory note executed by the then Executive Officer of the defendant-Devasthanam under the following circumstances. The Zamindar of Uthumalai was and perhaps is the hereditary trustee of the defendant-Devasthanam. The Hindu Religious Endowments Board took action under section 57 of Madras Act (II of 1927) and framed a scheme of administration for the defendant temple. Apparently, one of the charges against the hereditary trustee was that he had misappropriated a sum of nearly Rs. 80,000 belonging to the temple funds. Under this scheme, an Executive Officer was appointed and certain powers were conferred upon him and certain duties imposed upon him. With the sanction of the Hindu Religious Endowments Board, the Executive Officer of the defendant-temple borrowed a sum of Rs. 2,500 from the plaintiff-temple, which temple had also been authorised by the Board to advance the loan, for the purposes of launching a suit against the hereditary trustee to recover the moneys misappropriated by him. The hereditary trustee filed a suit O.S. No. 10 of 1950, District Court, Tirunelveli, under sub-section (7) of section 57 of 1927 Act to have the order of the Board settling a scheme for the defendant-temple set aside. In this suit, the Sub-Court, to whom the suit was transferred and where it was numbered O.S. No. 133 of 1951, made an order on 17th November, 1953, appointing the hereditary trustee as the receiver. The suit, however, was not disposed of till 1956 by the Sub-Court. The Sub-Court effected certain modifications in the scheme and an appeal from the decision of the Sub-Court is still pending on the file of this Court. It, however, appears that the High Court ordered the continuance of the hereditary trustee as receiver till the disposal of the appeal.

In the course of the administration of the temple, the Executive Officer paid a sum of Re. 1 towards the suit promissory note debt on 27th January, 1954. The suit was filed within three years of the date of this payment, this payment being relied upon to extend the period of limitation.

Notwithstanding the appointment of the hereditary trustee as receiver, the suit was laid by the plaintiff-temple against the defendant-temple represented by its Executive Officer. The hereditary trustee intervened and contended that in view of his appointment as receiver, he was entitled to represent the temple and that the suit as laid could not be maintained. The receiver was allowed to come on record. His contentions were that the Executive Officer was not competent to borrow the amount and had no authority for such borrowing. Nor, according to him, was the

plaintiff itself competent to lend the money. He attacked also the competency of the Executive Officer to make any payment towards the suit promissory note and keep it alive. The further contention was that the suit as laid against the defendant-temple, represented by its Executive Officer was not validly laid and that it was only on the date when the hereditary trustee was allowed to come on record as representing the temple that the suit should be deemed to have been properly laid, which date, according to him, was beyond three years from the date of the endorsement of payment of Re. 1 extending the limitation.

On the issues that were framed, the learned District Munsif of Tirunelveli held against these contentions and decreed the suit. On appeal, however, the learned District Judge of Tirunelveli, while holding that the suit promissory note was true, valid and binding on the defendant, held that the appointment of the receiver virtually abrogated the appointment of the Executive Officer under the scheme, and that, therefore, the Executive Officer had no longer any authority to acknowledge the debt. Even apart from that, the learned District Judge felt that the Executive Officer should have had specific authority from the Board for so acknowledging the liability. On this ground, he held that the suit was not in time. He further held that the date on which the receiver was impleaded, that is, 16th October, 1957, being more than three years after the date on which the debt was acknowledged, the suit was barred by limitation. Accordingly, the suit was dismissed.

The plaintiff-temple appeals.

The points that arise for consideration are clear from the above. They are, whether notwithstanding the appointment of the hereditary trustee as receiver, the Executive Officer of the defendant-temple could validly acknowledge the debt, and whether the suit as laid against the defendant-temple, represented by its Executive Officer, was properly instituted.

The learned District Judge appears to have thought that the appointment of receiver by Court in effect removed the Executive Officer appointed under the scheme from his office. That was principally the ground upon which he came to the conclusion that the Executive Officer could not acknowledge the liability on 27th January, 1954 and could not also properly represent the temple in the suit. It seems to me that this view cannot be supported either by the provisions of the Act or on the basis of decided authority. Under section 57 (7) of the Act (II of 1927),

> " the trustee or any person having interest may within six months of the date of such publication institute a suit in the Court to modify or set aside such order."

This provision enables the trustee to question the propriety of the framing a scheme of administration for the temple. It is common ground that in the present case, a scheme was framed on 4th March, 1950, and the suit was filed by the hereditary trustee under the provisions of this section. The Hindu Religious Endowments Act of 1927 was repealed and replaced by Madras Act (XIX of 1951). Section 58 of this Act empowers the Deputy Commissioner to frame schemes for the proper administration of religious institutions. Under section 103 of this Act, a scheme settled under 1927 Act shall in so far as it is not inconsistent with this Act be deemed to have been made by the appropriate authority under the corresponding provisions of the 1951 Act. An aggrieved party is given a right of suit and under section 62 (1), a suit to set aside a scheme framed under section 58 of the new Act is competent. It has been pointed out that under section 103 of the new Act, a scheme framed under section 57 of the old Act is deemed to be a scheme framed under section 58 of the new Act. Section 62 of the new Act contains an important provision relating to the power of the Court in which a suit is laid to set aside or modify a scheme. This provision is in these terms :

> " And the Court may modify or cancel such order, but it shall have no power to stay the Commissioner's order pending the disposal of the suit."

In plain words, therefore, this section places a restraint upon the powers of the Court and it states that till the final disposal of the suit, the order of the Commissioner framing the scheme shall not be stayed. The question is whether in the light of this specific prohibition the appointment of the hereditary trustee as receiver has any effect upon the administration of the temple by the Executive Officer appointed under the scheme.

The learned District Judge observed :

" In this case, what the Court has done is not to stay any order but to appoint altogether a different person and that too after hearing both sides."

If what the learned District Judge means is that the Court shall not pass an order to the effect that the order framing the scheme is stayed or the operation of the scheme is stayed, but that in other respects, the Court is competent to make some order in variation of the terms of the scheme, I am unable to agree. The expression " shall have no power to stay the Commissioner's order " is compendious and what the Act aims at is to postpone whatever relief the Court is called upon to grant to the stage of final determination of the suit. The dominant intention behind this provision is that when a competent authority has in the interests of the administration of the religious institution taken certain steps in the framing of a scheme and provided for the management of the institution in a particular manner, while the aggrieved party is no doubt competent to approach the Court and question the validity of the order or the propriety of the provisions of the scheme, the Court is prevented from, in a manner of speaking, pre-judging the issue and making any interim order varying the provisions for the management of the institution. It is true that under Order 40 of the Code of Civil Procedure, the Court has unquestioned powers for the appointment of a receiver in a stated set of circumstances. But it has nevertheless to yield to a statutory prohibition of the nature contained in Act (XIX of 1951). It seems to me therefore that the mere fact of the appointment of the hereditary trustee as receiver, with nothing more, cannot be inferred as having the effect of staying the operation of any portion of the scheme. It appears that in this case though the Executive Officer was in fact appointed, he was not able to take possession of the temple itself. In so far as the possession of the temple is concerned, which apparently remained all along with the hereditary trustee, the order appointing him as receiver might no doubt have been effective. But when the Court did not specifically deal with any of the other clauses of the scheme whereunder the Executive Officer had been conferred powers of management, the receiver did not derive any authority from the Court's order appointing him as such to interefere with the Executive Officer's management of the institution.

The decision in *Muthuswami Gurukkal* v. *Ayyaswami Thevar*,[1], dealt with an analogous case where the ban imposed by section 62 (1) of Act (XIX of 1951) came to be considered. The decision was that the Court had jurisdiction to grant the relief of interim injunction and that its jurisdiction was not barred by reason of section 62 (1) of the Act. The learned Judges observed :

" If the ordinary jurisdiction of the civil Court is to be ousted, it must be by the express words or by necessary intendment of the statutory provision on which reliance is placed. The ban imposed by section 62 (1) can be applied only to the extent warranted by the language o that statutory provision. The rest of the jurisdiction of the civil Court, that for instance regulated by rules 1 and 2 of Order 39, will remain intact. It is neither desirable nor even possible to devise a formula of universal application to define the precise scope of the ban imposed by section 62 (1) of Act (XIX of 1951). We can concern ourselves in these appeals only with the question whether the reliefs asked for by the plaintiffs-appellants fell within the mischief of the statutory ban imposed by section 62 (1)."

In that case, the relief that had been asked before the Deputy Commissioner was a declaratory one that certain persons were the hereditary trustees of the temple. That relief was refused and the suit was to establish that right and to set aside the order of the Deputy Commissioner. In so far as that order of the Deputy Commissioner was concerned, it related only to a question of status of the parties, whe-

1. (1958) 1 M.L.J. 256 : I.L.R. (1958) Mad. 703.

ther they were hereditary trustees or not. Obviously, in such a suit no question of possession of the lands was ever before the Deputy Commissioner and the order of the Deputy Commissioner had no relation to such possession of the lands. In the suit that was laid by the persons claiming to be hereditary trustees, the relief that was asked for was an injunction restraining the other persons from interfering with the possession of lands. It was in this context and confining themselves to these facts that the learned Judges who decided the above case proceeded to obsrve :

"What the appellants now seek is that their possession of the temple lands should not be interfered with by the trustees, defendants 1 to 3, till the disposal of the suits. The grant of such a relief will not amount to stay of the operation of the Commissioner's order till the disposal of the suits within the meaning of section 62 (1). There was no direction of the Deputy Commissioner in his order which related to the lands or of any of the other properties of the temples. There could not have been such a direction in proceedings under section 57 (*b*) of the Act. The order of the Deputy Commissioner would be left intact even if the restricted interim relief now asked for by the appellants is granted."

It is clear from the above facts that the grant of a temporary injunction that was asked for in that suit had no effect upon the Deputy Commissioner's order which had been made under section 57 (*b*) of the Act and accordingly the restraint imposed upon the Court by section 62 (1) of the Act was not attracted. This decision is not an authority for the proposition that the mere fact that the hereditary trustee was appointed as receiver overruled the provisions of the scheme to such an extent that the appointment to the Executive Officer under that scheme became null and void. It follows that the competency of the Executive Officer remained unaffected by the appointment of the receiver and he could take such steps in relation to the administration of the temple as contemplated under the scheme in so far as they did not interfere with the receiver appointed by Court.

Though several contentions were raised about the lack of sanction for the loan, it is clear from the records that the Hindu Religious Endowments Board as the proper authority, authorised the Executive Officer of the defendant-temple to obtain this loan. It also authorised the plaintiff-temple to advance the loan. This contention that the loan was not incurred on proper authority was virtually abandoned during the course of the hearing. It was however alleged that even under the terms of the scheme the Executive Officer had no authority to acknowledge the liability on 27th January, 1954 by the payment of Re. 1.

I am not satisfied that the learned District Judge was right in concluding that the Executive Officer had no such authority. It seems to me that where the loan had been obtained and the liability had been incurred under proper sanction and further when the Executive Officer under the provisions of the scheme was competent to receive the moneys due to the temple, make disbursements on behalf of the temple and be in custody of all the properties of the temple it is straining the language to say that in making the payment in partial discharge of the loan which had been validly incurred, the Executive Officer exceeded his authority. Clause 8 of the scheme for instance says :

"The funds of the temple shall be deposited in any of the banks approved under the Board's bye-laws in the name of the temple, and the bank account shall be operated upon by the Executive Officer from time to time as the exigencies of the administration may require........"

When the Board had approved of the incurring of the debt for the purposes of the temple and the Executive Officer had been conferred the powers of dealing with the moneys belonging to the temple on behalf of the temple, it seems to follow that the Executive Officer was equally competent to make payments in discharge of such loans. To hold otherwise would be utterly out of tune with the various provisions of the scheme prescribing the powers and duties of the Executive Officer. It is argued on behalf of the respondent that such a power cannot be inferred. Reliance has been placed upon *Chidambaram Pillai* v. *Veerappa Chettiar*[1], and other cases of like nature. In this case, a promissory note was executed by a person describing himself merely as the executor of the estate of *A*. In a suit brought on the promissory note, a decree was sought against the estate. That was refused, the learned

1. (1917) 6 L.W. 640.

Judge holding that only the executor and his heirs were liable and the estate of which he was executor cannot be made liable. Sadasiva Iyer, J., observed in passing that a power to manage the properties and to sell them for discharge of debts does not give a power to renew or acknowledge debts. In a similar manner, in *Subbakkal* v. *Venkata Chetti*[1], it was held that where a guardian appointed under the Guardians and Wards Act, who was specifically enjoined to obtain the permission of the Court to make certain payments, made payments without the orders of the Court, such payments were not enough for purpose of saving limitation under section 19 and section 21 of the Limitation Act. It would be noticed that in both of these decisions there was a specific restraint placed upon the persons making the acknowledgment. But that is not the case here. Here, in my opinion, the terms of the scheme give full powers to the Executive Officer to make such payments in discharge of loans lawfully obtained. The view taken by the learned District Judge that the Executive Officer had no authority to make this acknowledgment is, in my opinion, incorrect.

Nor am I impressed with the further argument advanced before me that the suit against the temple should be deemed to have been laid only on the date when the hereditary trustee was brought on record which was beyond three years from the date of the acknowledgment, and for that reason the suit must fail. It is clear that the suit was against the temple. It was represented by a person, *i.e.*, the Executive Officer, who was competent to represent it under a specific provision in the scheme. Clause 7 provides that the Executive Officer shall represent the temple in all legal proceedings. The learned District Judge in coming to the conclusion that the suit should be deemed to have been instituted against the temple only on 16th October, 1957 has not considered the effect of this clause. He seems to have thought that when the High Court confirmed the order of appointment of the hereditary trustee as receiver pending disposal of the appeal, the necessary result was that the Executive Officer's power was taken away. He does not say so in such clear terms, but that is the underlying idea. Even the order of the High Court left the Executive Officer intact. The learned Judge stated :

> " I do not therefore think that the Executive Officer should be brought in at this stage. The proper thing, therefore, would be to impose stringent conditions on the conduct and administration of the present receiver while allowing him to continue to function as such . . . . . ."

Far from interfering with the management of the institution by the Executive Officer, the High Court only allowed the receiver to continue to a certain extent and in so far as matters specified in that order were concerned. If, therefore, clause 7 of the scheme was not abrogated and the Executive Officer was lawfully authorised to represent the institution in legal proceedings, notwithstanding that he *was replaced* by the hereditary trustee at a later stage in the suit, the suit as laid was properly instituted. In support of this, several decisions, of which two alone need be referred, may be mentioned. In *Saraspur Manufacturing Co., Ltd.* v. *B.B. & C.I. Ry. Co.*[2], the suit was laid against the railway, the title of the defendant being "The Agent, B. B. & C. I. Railway." The suit was dismissed on the ground that it was badly framed. The learned Judge held that it was only a mis-description in the title of the railway and that the suit was really against the railway. In *Nanakchand Mukandi Lal* v. *East India Railway*[3], it was held that notwithstanding that the suit was directed against the Agent of the railway, since the plaint showed that the plaintiff's claim was against the railway company as such, the suit had been properly instituted. These cases are not directly in point. Nevertheless, they establish the principle that the suit claim could not be defeated for such technical reasons. Even apart from that, I have held that on the date when the suit was laid, the Executive Officer properly represented the institution.

In the result, the judgment and decree of the District Judge are set aside and those of the learned District Munsif restored. The appellant will be entitled to its costs throughout.

K.S. ——— *Appeal allowed.*

1. (1932) M.W.N. 1193.
2. (1923) I.L.R. 47 Bom. 785.
3. (1925) I.L.R. 6 Lah. 252.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Annamalais Timber Trust & Co., Chalakudi .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 42 (1) and (3)—Applicability—Extent of apportionment.

The Tribunal rightly held that the profits of the assessee accrued wholly in Cochin where all the operations under that contract were carried out by the assessee, and where he was paid all that was due to him under that contract. Section 42 of the Income-tax Act, 1922, applies only if the profits are deemed to have accrued or arisen within the taxable territories and not when they actually accrued or arose within them.

That, in the circumstances of this case the negotiation and conclusion of the contract constituted one of the essential trading operations of the assessee can admit of no doubt. That is sufficient to bring it within the scope of section 42 (1) of the Act, and that, in its turn, in the circumstances of this case, attracts the application of section 42 (3) of the Act.

In the circumstances of this case, where the contract alone is to be taken as having been concluded in British India, a contract which no doubt had special features the share to be attributed to that should not be in excess of 10 per cent.

Anglo-French Textile Co., Ltd. v. *Commissioner of Income-tax,* (1954) S.C.J. 76 : (1954) 1 M.L.J. (S.C.) 146, *Royal Talkie Distributories, Madurai* v. *Commissioner of Excess Profits Tax,* Case Ref. No. 36 of 1952, relied on.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench 'B' under section 66 (2) of the Indian Income-tax Act, 1922 (Act XI of 1922) in R.A. Nos. 284, 285, 286 and 287 of 1953-54 (I.T.A. Nos. 1245, 2374, 2375 and 2376 of 1952-53—Assessment years of 1944-45, 1945-46, 1946-47, and 1947-48 respectively) on its file for decision on the following question of law, *viz.*:—

" Whether, on the facts and in the circumstances of the case, there is justification for the apportionment made by the Tribunal of the profits between British India and Cochin State ?"

V. Sethuraman and *S. Padmanabhan,* for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax and *S. Ranganathan* for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The question referred to this Court under section 66 (2) of the Income-tax Act was :

" Whether on the facts and in the circumstances of the case, there is justification for the apportionment made by the Tribunal of the profits between British India and Cochin State ?"

The findings of the Tribunal, with reference to which we have to answer this question, lie within a comparatively brief compass :

(1) it was within British India that the assessee entered into the contract with the Government of India ;

(2) all the other trading operations of the assessee in all the relevant years were undertaken only within Cochin State ; and

(3) all the profits were realised and received by the assessee in Cochin State, that is, outside British India.

The Tribunal held that, though the profits of the contract business actually accrued to the assessee wholly outside British India, the provisions of section 42 of the Act applied, and that the assessee was liable to be taxed on 50 per cent. of his share of the profits of that contract.

Annexure A to the Statement of the Case was taken as evidence of the contract which the assessee entered into with the Government of India. The learned counsel

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* Referred Case No. 51 of 1955.

24th February, 1960.
(15th Phalguna, 1881, Saka).

for the assessee urged that the finding of the Tribunal, that the assessee and the Government of India entered into that contract at Delhi, was erroneous as Annexure A was only in the nature of a final offer from the Government which was addressed to the assessee at his place of business in Cochin. The further contention of the learned counsel for the assessee was that, if that offer had been accepted only at Cochin, that would have been the place where the parties entered into the contract. The learned counsel relied on *Rajkumar Mills, Ltd.* v. *Commissioner of Income-tax*[1], where the Supreme Court laid down that the question where a contract was concluded would be a question of law for the Court to determine in proceedings under section 66 of the Act. Of course, if all the findings of fact were available, what should be the inference to be drawn from those facts would be a question of law. In this case, however, without a further investigation of facts we cannot reopen the question concluded by the finding of the Tribunal, where was the contract concluded. Therefore it is not wholly a question of law that the counsel for the assessee could be allowed to raise at this stage. The parties proceeded all along on the basis, that the contract was concluded within British India, and it is not open to the assessee to contend that the place of contract itself is a matter for investigation at this stage. Even in paragraph 14 of the Annexure A what the assessee was asked to do was to confirm the contents of that letter, which purported to set out what the parties had agreed upon at Delhi. We shall therefore proceed on the basis, that the Tribunal was not in error when it held that the assessee had negotiated and concluded the contract in British India.

It should be taken as well-settled now that where the contract was entered into is really immaterial in cases of this kind to decide where the profits of the contract accrued or arose ; See *Commissioner of Income-tax, Madras* v. *Anamallais Timber Trust Ltd.*[2], the principles laid down in which were followed by the Mysore High Court in *Income-tax Commissioner* v. *Mysore Engineering Co.*[3], by the Andhra High Court in *Rupajee Ratnachand* v. *Commissioner of Income-tax*[4], by the Nagpur High Court in *Bhopal Textiles Ltd.* v. *Commissioner of Income-tax*[5]. The Tribunal rightly held that the profits of the assessee accrued wholly in Cochin where all the operations under that contract were carried out by the assessee, and where he was paid all that was due to him under that contract. The learned counsel for the Department referred us to the observations of the Supreme Court in *Anglo-French Textiles Co., Ltd.* v. *Commissioner of Income-tax, Madras*[6], where the learned Judges explained the scope of their earlier decision in *Commissioner of Income-tax, Bombay* v. *Ahmedbhai Umarbhai & Co.*[7], that the need for apportionment of profits might arise independent of section 42. Whether, if the profits accrued or arose within British India, which constituted the taxable territories, those profits should be apportioned independent of section 42 of the Act does not arise for consideration in this case. Section 42 of the Act, it should be taken as well-settled now, applies only if the profits are deemed to have accrued or arisen within the taxable territories, and not when they actually accrued or arose within them.

So the real question for determination is, whether section 42 (1) of the Act applies. If it does, there has to be an apportionment under section 42 (3).

The learned counsel for the assessee referred to the observation of the Supreme Court in *Anglo-French Textiles Co., Ltd.* v. *Commissioner of Income-tax*[6] :

> " . . . . . . we wish to point out that it is not every business activity of a manufacturer that comes within the expression ' operation ' to which the provisions of section 42 (3) are attracted. Those provisions have no application unless according to the known and accepted business notions and usages the particular activity is regarded as a well-defined business operation. Activities which are not well-defined, or are of a casual or isolated character would not ordinarily fall within the ambit of this rule. Distribution of profits on different business operations or activities ought only to be made for sufficient and cogent reasons. . . . . . ."

1. A.I.R. 1955 S.C. 628 : (1955) 28 I.T.R. 184.
2. (1950) 18 I.T.R. 333.
3. A.I.R. 1953 Mys. 73.
4. (1955) An.W.R. 145 : (1955) 28 I.T.R. 282.
5. (1956) 29 I.T.R. 171.
6. (1954) S.C.J. 76 : (1954) 1 M.L.J. 146 : (1954) 25 I.T.R. 27 (S.C.).
7. (1950) S.C.J. 374 : (1950) S.C.R. 335 : (1950) 18 I.T.R. 472.

The learned Judges, however, added that the observations made in that judgment were limited to the facts and circumstances of that case. Even applying that test, it should be obvious that negotiating and concluding the contract in question in this case was one of the trading operations of the assessee. We shall advert a little later to the special features of that contract. In the oft-quoted passage in *Commissioner of Income-tax, Bombay* v. *Chunilal B. Metha*[1], their Lordships of the Privy Council observed :

" Their Lordships are not laying down any rule of general application to all classes of foreign transactions, or even with respect to the sale of goods. To do so would be nearly impossible and wholly unwise—to use the language of Lord Esher in *Erichsen* v. *Last*[2]. They are not saying that the place of formation of the contract prevails against everything else. In some circumstances it may be so, but other matters—acts done under the contract, for example—cannot be ruled out *a priori*."

As we said, that in the circumstances of this case the negotiation and conclusion of the contract constituted one of the trading operations of the assessee can admit of no doubt.

The learned counsel for the Department relied on the observations of Satyanarayana Rao, J., in *Commissioner of Income-tax* v. *Rodriguez & Co.*[3], and contended that the contract itself should be viewed as a source of the profits that the assessee made, and as that source lay within British India, it came within the scope of section 42 (1) of the Act. We would, however, prefer to rest our decision in this case on the basis, that the contract the assessee obtained evidenced by Annexure A, was one of his essential trading operations. That is sufficient to bring it within the scope of section 42 (1) of the Act, and that, in its turn, in the circumstances of this case, attracts the application of section 42 (3).

The question that remains for consideration is, whether the Tribunal was right in apportioning 50 per cent. of the assessee's share of the profits to the only trading operation of his that took place within British India. The claim of the assessee before the Tribunal was that not more than 5 per cent. should be attributed to the trading operation carried out within British India, that is, the conclusion of the contract. The contract that the assessee obtained had special features. We should like to guard ourselves at this stage by emphasising that all our observations are only with reference to the contract before us. We are not to be understood as laying down as a proposition of law of general application to all cases, where a contract for execution of work takes place within the taxable territories, and all the other operations take place outside the taxable territories. The contract that the assessee obtained was obviously the subject-matter of considerable negotiations, including tripartite conferences at Delhi, in which the assessee, a representative of the Bombay, Burmah Trading Corporation and the Government of India participated. The assessee was entitled to some special rights under the contract, and the contract provided for close collaboration between the assessee and the Government of India at all stages in the work to be carried out under the contract within the State of Cochin. The assessee was entitled to 10 per cent. of the cost of production as his profits, which, of course, he had to share with the Bombay-Burma Trading Corporation, which provided trained personnel to supervise the execution of the works. Taking the special features of the contract into consideration, we are of opinion that a share of the assessee's profits should be attributed to that trading operation, and that the share to be so attributed should be something more than nominal. The learned counsel for the assessee pointed out that in *Anglo-French Textiles Co., Ltd.* v. *Commissioner of Income-tax*[4], 10 per cent. was considered reasonable; where the trading operations consisted of purchase of raw materials within the taxable territories, while the rest of the trading operations were in Pondicherry outside the taxable territories. We see considerable force in his contention, that there will be no justification for allowing a higher percentage than 10 per cent. in this case, where the only trading operation within British India was to negotiate and conclude the contract. In

1. I.L.R. (1938) Bom. 752: L.R. 65 I.A. 332 : (1938) 6 I.T.R. 521 at 533 (P.C.).
2. (1881) L.R 8 Q.B.D. 414.
3. (1951) 2 M.L.J. 346 : (1951) 20 I.T.R 247 at page 260.
4. (1954) S.C.J. 76 : (1954) 1 M.L.J. (S.C.) 146 : (1954) 25 I.T.R. 27.

the unreported decision in *Royal Talkie Distributors, Madurai* v. *Commissioner, Excess Profits Tax*[1], to which one of us was a party, this Court pointed out that the apportionment of profits should not be arbitrary but should be on a rational basis. In this case the Tribunal fixed 50 per cent. as the share attributable to the trading operation carried out in British India, but on what basis the Tribunal considered 50 per cent. was a fair share, the Tribunal did not explain either in the order of appeal or in the statement of the case. As we said, in the circumstances of this case, where the contract alone is to be taken as having been concluded in British India, a contract which no doubt had special features, we think that the share to be attributed to that should not be in excess of 10 per cent.

Our answer to the question is that there was justification for apportionment under section 42 (3) of the Act, but there was no justification for apportioning 50 per cent. to the operation carried out in British India; there was justification only for apportioning 10 per cent. of the assessee's share of the profits to the trading operations he carried out in British India.

As neither side has wholly succeeded there will be no order as to the costs of this reference.

K.L.B. *Reference answered partly in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHAMED KUTTY.

Arasiramani Panchayat by its Executive Authority P. Ramalingam.. *Petitioner**

v.

Sellappa Goundar and others .. *Respondents.*

Madras Village Panchayats Act (X of 1950), section 111 (1)—Jurisdiction of civil Court to question assessment—When could be invoked.

In order to get over the bar under section 111 (1) of the Madras Village Panchayats Act, 1950 and invoke the jurisdiction of the civil Court to question the validity of an order of assessment it should be shown that in levying the assessment in question the provisions of the Act and Rules have not in substance or effect been complied with.

Petitions under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Sankari at Salem, dated 25th August, 1959 and passed in S.C.S. Nos. 972, 973 and 974 of 1958.

V. P. Raman, for Petitioner.

K. S. Mahadevan (*amicus curiae*), for Respondents.

The Court delivered the following

JUDGMENT.—The common point that arises for determination in these revision petitions is whether the re-assessments levied on the respective respondents are arbitrary, and if not, whether the Court below was competent to go into the question.

The facts of the case may be briefly stated. The respective respondents are owners of tiled houses in Kurukkuparaiyur, a hamlet attached to Arasiramani Panchayat. Each of them was assessed to house tax. The respondent in C.R.P. No. 2206 of 1959 at Rs. 18-25nP. for each half year from 1st October, 1956, the respondent in C.R.P. No. 2207 of 1959 at Rs. 13-12nP. and the respondent in C.R.P. No. 2208 of 1959 at Rs. 18-75 nP and Rs. 9-50 nP. in respect of his two houses for the same period. They defaulted in the payment of tax for three half years form 1st October, 1956 to 31st March, 1958. Distraint proceedings taken against them proved ineffective, so that the Panchayat instituted the three small cause suits out of which these revision petitions arise against the respective respondents for recovery of the arrears due.

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1. Case Ref. No. 36 of 1952.

*C.R.P. Nos. 2206, 2207 and 2208 of 1959. 12th January, 1961 (22nd Pausa, 1882, Saka)

Each of the respondents resisted the claim. They pleaded that the assessment in each case was arbitrary and that in levying the assessments in question the mandatory provisions of the Madras Village Panchayat Act (X of 1950) and the Rules framed thereunder had not been adhered to by the Panchayat Board. In view of the common plea raised by respondents, the learned District Munsif tried all the suits together and disposed them by a common judgment. He found that the assessments in all these cases had not been made in substantial compliance with the provisions of the Act or the Rules, and therefore, the respondents were entitled to question their propriety and quantum in a civil Court. Accordingly, he decreed the suits for admitted amounts as subsequently revised and reduced at the instance of the Inspector of Municipal Councils and Local Boards.

It is contended for the petitioner that by reason of the bar under section 111 of the Act, the learned District Munsif had no jurisdiction to go into the propriety of the rate of the taxes and that if the respondents were dissatisfied with the assessments, they should have resorted to machinery provided by the Act itself for relief. Under the Act and the Rules framed thereunder it is open to an assessee, if he is aggrieved with the quantum of tax levied on him, to pay the tax and appeal to the Panchayat for reduction of the tax. That has not been done in the present case. On the other hand, when the Panchayat Board sought to recover the tax amount defaulted by the respondents they urged in defence that the taxes levied on them was arbitrary and not in accordance with the provisions of the Act and the Rules.

The question is whether in view of section 111 of the Act, they are entitled to thus resist the claim.

Section 111 (1) of the Madras Village Panchayat Act, X of 1950, is to the following effect:

> " No assessment or demand made, and no charge imposed, under the authority of this Act shall be impeached or affected by reason of any clerical error or by reason of any mistake (*a*) in respect of the name, residence, place of business or occupation of any person, or (*b*) in the description of any property or thing, or (*c*) in respect of the amount assessed, demanded or charged, provided that the provisions of this Act have in substance and effect been complied with. And no proceedings under this Act shall, merely for defect in form, be quashed or set aside by any Court of Justice."

Rule 22 further provides that the assessment or demand of any tax when no appeal is made, as provided under the Act, or when an appeal is made, an adjudication of the Panchayat thereon shall be final. So that in order to give jurisdiction to a Civil Court to go into matters prohibited by section 111 of the Act, it should be shown that in levying the assessment in question the provisions of the Act have not, in substance, or effect been complied with. Whether this has been done or not is a question of fact. In paragraph 8 of his judgment the learned District Munsif has observed :

> " As regards the original assessment for the suit period it is in the admissions of P.W. 1, the President of the plaintiff Panchayat, that the rate was fixed by him as it suggested to him to be reasonable and without any regard to the capital value or other circumstances, which should have been taken into consideration while assessing house tax under the provisions of the Act as well as the Rules framed thereunder."

I have been taken through the evidence, and I am constrained to state that the above observations of the learned District Munsif are not warranted by the evidence on record. On the other hand, what has been stated by the President of the Panchayat as P.W. 1 is that they prepared the assessment register after inspection of the houses and ascertaining their capital value. Nowhere in the evidence is there support for the observation that the assessment was made without any regard to the capital value and the other circumstances. Therefore, if, on the evidence, the finding of the learned District Munsif that the assessments in these cases had been made without reference to the capital value or other circumstances is not supportable, and I am satisfied it is not possible to support it, it should follow that the assessments in all these cases, had been made in substantial compliance with the provisions of the Act, in other words with due regard to one of the bases laid down in section 64 of the Act. The fact that, subsequently, on applications made to the Inspector of Local Boards, he chose to reduce the taxes cannot alter the position or confer jurisdiction on the learned Dis-

trict Minsif to go into the question of quantum of rent. In the circumstances, I am satisfied that the decrees in the respective suits for a smaller sum than claimed by the petitioner Panchayat are not supportable and that each of the suits should have been decreed for the full amount claimed. All the three revision petitions are therefore allowed and the decree in each of these cases is modified by substituting the amount claimed by the petitioner in the place of the amount decreed by the learned District Munsif. As the respondents have not chosen to oppose these pettions, I make no order as to costs. I am however thankful to Mr. K. S. Mahadevan for having argued the respondents' case as *amicus curiae* for the respondents.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE KUNHAMED KUTTI.

Arunachalam Chettiar through Power Agent and mother Thirunellai Achi .. *Appellant**

v.

S. RM. AL. Annamalai Chettiar .. *Respondent.*

Madras Indebted Agriculturists (Temporary Relief) Act (V of 1954)—Debtor owning lands outside the State of Madras—If entitled to the benefits under the Act.

Interpretation of statutes—Enactment not clear—Resort to other matters and Preamble to ascertain the meaning—Definition term—Cannot enlarge the limited scope of the Act in which it occurs.

The Madras Indebted Agriculturists (Temporary Relief) Act V of 1954 was intended to meet a situation peculiar to the agriculturists in the Madras State. It is reasonable to assume that by enacting section 6 in the Act it was not intended to give the benefit of the Act to persons owning lands or other properties outside the State of Madras.

If the scope of the enactment and the context in which the defined term is used to provide only or a limited operation *i.e.*, the agriculturists within the State of Madras the term 'agriculturist' tself can have only a limited meaning.

There is nothing in the enacting part of Act V of 1954 to indicate which class of agriculturists the Act were to apply. It will therefore be permissible to refer to the Preamble to ascertain the scope of the statute. The Preamble to the Act has defined the class of agriculturists who are entitled to the benefits given under the Act, *i.e.*, those owning lands within the State of Madras. The operation of the Act should be restricted accordingly.

The Court would be competent to ascertain what the meaning of the general words employed in the statute, is in the context of the enactment and with due regard to the subject-matter dealt with by the Statute.

If the enacting part is clear *prima facie*, that should be taken as declaring the intention of the Legislature and no other aid should be resorted to for the purpose of ascertaining it. But where it is not so clear resort may be had to other matters for ascertaining the true construction.

It may be accepted as a general rule that the words occurring in an Act should be interpreted in terms of the definition contained therein. At the same time if the scope of the enactment itself is limited the terms of the definition cannot enlarge it.

The plea that whether a mistake of law as to the applicability of the Act in the absence of evidence as taking advice from competent persons can be said to be a mistake made in good faith was not allowed to be raised as belated.

Appeal against the order of the Court of the Subordinate Judge of Devakottai, dated 13th February, 1958 and made in E.P. No. 291 of 1956 in O.S. No. 121 of 1926.

M. Natesan, for Appellant.

C. S. Rajappa, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal which is filed by the decree-holder (fourth defendant) raises a question of limitation, namely, whether E.P. No. 291 of 1956 in O.S. No. 121 of 1926 is barred by the provisions of section 48, Civil Procedure Code.

* A.A.O. No. 218 of 1958.

14th February, 1961
(25th Magha, 1882, Saka)

The suit was one for accounts on the basis of a dissolved partnership. The decree in the suit was passed on 20th February, 1928, under which the second defendant along with two others were directed to pay a large sum of money to the fourth defendant. By a subsequent agreement between the parties which was duly recorded in Court the liability of the defendants was split up. Under the terms of the compromise, the second defendant was to give security for the decree against him and also pay a sum of Rs. 2,000 per year, the balance of the decree amount to be paid on 13th April, 1943, on which date the decree-holder would attain the age of majority. For the due performance of the decree (under the terms of the compromise) the second defendant was to give security of certain immoveable properties. This he did. Both the compromise as well as the security bond were duly registered. The execution petition out of which this appeal arises was filed on 5th April, 1956, more than 12 years from the date when the money under the decree became payable. The appellant claimed that he was entitled to exclude the period from 5th December, 1953 to 27th February, 1955, by virtue of section 5 of the Madras Indebted Agriculturists (Temporary Relief) Act, V of 1954 (to be referred to also as the Act) as the judgment-debtor was an agriculturist entitled to the benefit of the moratorium declared by that Act and by the Ordinance V of 1953, which preceded it. Before the lower Court it was urged on behalf of the appellant that the debtor owned certain agricultural lands in the villages of Kothamangalam and Nappalkudi in the Ramnad District within the State of Madras. The lower Court found—and that finding has not been challenged before us—that the judgment-debtor did not own any agricultural lands in this State. But the appellant now relies on the circumstance of the judgment-debtor owning agricultural lands in Pegu (which fact is not denied) and contends that possession of those lands on the material dates would entitle the debtor to the protection afforded by Act V of 1954 and the Ordinance preceding it and that the decree-holder being thereby prevented by filing the execution petition during the time when they were in force that is for a period of one year and twenty-six days, he would be entitled to the exclusion of that period in the computation of limitation. The appellant does not claim any benefit of the four months period given under Act I of 1955 as it has been found that the judgment-debtor was not an agriculturist within the meaning of that enactment.

The only question to be decided in this case is whether a person who owns agricultural lands not within the State of Madras but outside it would be entitled to claim the benefit of the Ordiannce V of 1953 and the Madras Act V of 1954. If the answer to that question is in the affirmative the decree-holder would be entitled to exclude the period during which the Ordinance and the Act were in force by virtue of section 5 of Act V of 1954. It will be sufficient to consider the provisions of the Act as the provisions of the preceding Ordinance are almost identical with it. The Act purports to provide for a temporary relief to indebted agriculturists. The Preamble to it refers to the draught in the preceding years which led to greater indebtedness of the agriculturists and of the coming in of adequate rains during the year enabling the agriculturists to devote their energies to cultivation with assiduity and the necessity for relieving them from the pressure of creditors for a short time in order that the maximum possible advantage might result to the State in the matter of food production. The Preamble would appear to show that the object of the legislation was to benefit agriculturists possessing lands in this State as the failure of monsoon and increasing the food production referred to could only relate to this State.

Section 3 of the Act provides that no suit for recovery of debt or application for execution of the decree against an agriculturist could be instituted for a period of one year from the commencement of the Act. A similar provision was contained in the Ordinance which was in force from 5th December, 1953, till the commencement of the Act. The term 'agriculturist' is defined under section 2 (a) of the Act thus:

"'agriculturist' means a person who owns an interest in land, and who, by reason of such interest, is in possession of such land or is in receipt of the rents or profits thereof and shall include a lessee" (the rest of the section is omitted as unnecessary).

Neither the terms of section 3 nor the definition of the term ' agriculturist ' impose any express qualification on the person claiming the benefit of the Act, that he should own agricultural lands in the State of Madras. It is argued for the appellant that whatever might have been the reason which influenced the Legislature to enact the legislation the operative part of the statute is clear and unambiguous and that read in the light of the definition would show that the benefit of the moratorium should be given to all persons who own agricultural lands whether it be within the State or outside it.

It was further argued that the words in the enacting part of the statute should be held to have been designedly used so as to comprehend a larger category of persons, as the Legislature whenever it wanted to restrict to agriculturists within the State of Madras, had used specific words to that effect. Reference was made in this connection to the Madras Agriculturists Debt Relief Act, IV of 1938, which defined the term of ' agriculturist ' as a person owning or possessing agricultural lands within the State of Madras, to the Madras Agrciulturists Income-tax Act and the Wealth Tax Act, etc.

One of the well settled and cardinal rules of construction of a statute is that its provisions should be considered in such a way as to accord with the intention of the Legislature that enacted it. How is that intention to be ascertained? One rule is that if the enacting part is clear, *prima facie*, that should be taken as declaring the intention of the Legislature and that no other aid should be resorted for the purpose of ascertaining it. But where it is not so clear resort may be had to other matters for arriving at the true construction. The question whether a statute applied to a particular subject-matter or only to a limited part of it cannot strictly or always be called one of construction of the statute. A statute may expressly provide in regard to its scope and applicability. But sometimes it may not be possible to ascertain the scope of the enactment by a mere reference to its provisions.

The question then arises whether in regard to these cases resort can be had to other matters for the construction of the statute. It is contended on behalf of the appellant that where there is no ambiguity in the enacting part of the statute, it is not the duty of the Court to restrict the scope of the Act by trying to understand the words used in it in any limited sense. We do not consider that this is the correct way of approaching the question. In *Thomson* v. *Advocate-General*[1], a question arose whether the words of a statute which levied an estate duty on every legacy given by a person by his will, would apply to the case of a legacy under a will executed by a person who was domiciled and died abroad. Answering the question in the negative Tindal, C.J., observed :

> "The very general words of the statutes must of necessity receive some limitation of their application for they cannot in reason extend to every person everywhere whether subjects of their kingdom or foreigners or at the time of their death domiciled within the realm or abroad."

In *Jefferys* v. *Boosey*[2], the English Copy Right Act of 1710 which gave protection to an author by giving him the exclusive right of printing for 14 years was held to apply only to British authors though there was no such qualification in the enacting part of the statute. It is therefore clear that a Court would be competent to ascertain what the meaning of the general words employed in the statute is, in the context of the enactment and with due regard to the subject-matter dealt with by the statute. In Maxwell's " Interpretation of Statutes " 10th Edition, it is stated at page 19 as follows :

> " The literal construction then, has, in general, but *prima facie* preference. To arrive at the real meaning it is always necessary to get an exact conception of the aim, scope, and object of the whole Act; to consider according to Lord Coke : (1) What was the law before the Act was passed ; (2) What was the mischief or defect for which the law had not provided ; (3) what remedy Parliament has appointed ; and (4) The reason of the remedy. "

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1. (1845) 12 Cl. & F. 1: 8 E.R. 1294. 2. (1854) 4 H.L.C. 815.

Act V of 1954 is not the first of those statutes which aimed at giving relief to agriculturists-debtors. In 1938 the Madras Agriculturists Relief Act was enacted providing for the scaling down of debts due by agriculturists. The operation of that Act was restricted to agriculturists who owned lands in the province of Madras. No doubt that was achieved as a result of the definition containing a qualification that the agriculturists who own or possess lands in the province. We shall presently consider whether the absence of any such qualification would at all make a difference. It is sufficient for the present purpose to state that historically speaking the State Legislature gave relief to agriculturists-debtors only in cases where they owned or possessed lands within the State of Madras.

It is necessary next to consider the mischief which the present enactment sought to remedy. The Agriculturists Relief Act, IV of 1938, did not prevent creditors from suing on their debts. Having regard to the unprecedented drought conditions in the State which had the effect of increasing the indebtedness of the agriculturists, temporary relief was deemed necessary to enable them to devote their energies exclusively to agricultural operations : and it was also found necessary that a more comprehensive legislation should be enacted to enable them to liquidate the accumulated liability. The first part of the object was achieved by Ordinance V of 1953 and Act V of 1954 which granted a moratorium to the debtors for a short time. The second part was achieved by Act I of 1955 which followed the Act V of 1954 providing for payment of debts incurrd by agriculturists in annual instalments. It is therefore clear that the Act was intended to meet a situation peculiar to the agriculturists in the Madras State. In our opinion, there is an indication in the provisions of the Act itself to show that a wider operation was not intended. A moratorium of the kind granted by the Act might be misused by unscrupulous debtors. For example a debtor while taking advantage of the moratorium might put all his properties outside the reach of creditors by effecting alienations, etc. Section 6 provides for raising a stautory presumption that wherever a debtor entitled to the benefits of sections 3 and 4 of the Act transfers immoveable property, such transfer shall be presumed to have been made with intent to defeat and delay the creditors. The property referred to in section 6 can only relate to those situate within the State as the State Legislature cannot legislate in regard to immoveable property outside it. This section which provides against alienations by debtors during the time when they are having the benefit of the Act or Ordinance cannot therefore apply to persons holding property outside the State. It is reasonable to assume that the Legislature would not have intended to give the benefit of the Act to persons owning lands or other properties outside the State, as it will be possible for them with impunity to defeat the claims of creditors. It follows that the benefit given by the Act should also be confined to those persons to whom the sanction provided by section 6 would apply. A person having no property in the State cannot therefore come within the ambit of sections 3 and 4 of the Act.

Mr. Natesan, learned counsel for the appellant, contended that there being no qualification in the definition of the term ' agriculturist ' in the Act it would not be competent for this Court to restrict its meaning. It may be accepted as a general rule that words occurring in an Act should be interpreted in terms of the definition contained therein. At the same time if the scope of the enactment itself is limited the terms of definition cannot enlarge it. The definition like any other word in the statute has to be read in the context, having regard to the scheme of the Act and the intention of the Legislature. That all statutory definitions should be read in the light of the context is clear from the section containing the definition itself which states that the definition given by the Act would apply only "if the context does not otherwise require". Therefore if the scope of the enactment and the context in which the defined term is used to provide only for limited operation, *i.e.*, to the agriculturist within the State, the term itself can have only that limited meaning. The Preamble to that Act clearly shows that the intention of the Legislature is to limit the operation of it to agriculturists owning lands in the State. The question then arises whether the Preamble can be looked into for the purpose of ascer-

taining the scope of the Act. In *Kochuni* v. *State of Madras and Kerala*[1], the Supreme Court observed that

" the Preamble of statute was a key to the understanding of it and that it might legitimately be consulted to solve any ambiguity or to fix the meaning of words which might have more than one or *to keep the effect of the statute within its scope* (italics supplied) whenever the enacting part is in any of these respects open to doubt."

In *Kannammal* v. *Kanakasabai Mudaliar*[2], Curgenven, J., observed :

" It is , I think, indisputable that before restricting the scope of an Act by the terms of its Preamble the Court must be satisfied that there was an intention on the part of the Legislature that its scope should be so restricted and, in fact, that the Legislature would have agreed, had the point been so put, that the passage relied upon in the Preamble should form part of the text of the Act. It is not open to the Court to speculate regarding the intentions of the Legislature or to frame its decisions in conformity with what it would itself have done had it been legislating. Now in the present instance, if the Preamble had declared it necessary to protect a certain clearly defined class of tenants, it might be reasonable to hold that, although the text is silent, there was an intention so to restrict it ; though even then the meaning of the Act would not be so clear as if the restriction had appeared in the body of it. "

In our opinion, it can be said in the instant case that the Preamble has defined a class of agriculturists, (that is those in the Madras State) who are entitled to the benefits given under the Act. Perhaps if the attention of the Legislature had been directed to it, they would have incorporated the substance of the term of the Preamble in the definition of the term ' agriculturist ' itself asthey did in the case of Act IV of 1938.

Reliance was placed by learned counsel for the appellant on the decision in *H.R.H. Prince Augustus* v. *A. G.*[3], for the proposition that the effect of the clear enacting words of a statute could not be restricted by the Preamble which gave only doubtful indication of the intention of the Parliament. We do not find in that decision any rule that a Preamble cannot be looked into for ascertaining the scope of the statute. Sir Raymond Evershed, M.R., decided the case on the assumption that the words in a statute *prima facie* of general import can be cut down so as to make the effect of the Act to correspond with its purpose by reference to other relevant statutes or other admissible matters of context or by reference to its Preamble. Romer, L.J., observed that while the function of the Court was to ascertain the intention of the Parliament from the language used to express it, due regard must be had to all relevant circumstances which existed at the time the Act was passed. The learned Lord Justice was not prepared to lay down as a rigid rule that a Preamble could not be looked into where the enacting part would go beyond the purpose of the statute (*see* page 662).

In *Popatlal Shah* v. *State of Madras*[4], the Supreme Court had to consider the meaning of the term sale in the Madras General Sales Tax Act of 1939 which according to the definition covered every transfer of property in goods not necessarily made within the State of Madras. Mukerjee, J., observed at page 742 :

" It is a settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself. The Title of the Madras Sales Tax Act described it to be an Act the object of which is to provide for the levy of a general tax on the sale of goods in the Province of Madras and the very same words are repeated in the Preamble which follows. The Title and Preamble, whatever their value might be as aids to the construction of a statute undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the legislation itself. The Title and Preamble of the Madras Sales Tax Act clearly show that its object is to impose taxes on sales that take place within the province though these words do not necessarily mean that the property in the goods sold must pass within the province. "

The learned Judge went on to observe that in defining the word sale,

". . . . . .the Legislature had in mind a sale in the province of Madras and as these words occur in the Title and Preamble to the Act it was not deemed necessary to repeat them in the definition or the charging section. "

There is nothing in the enacting part of Act V of 1954 to indicate to which class of agriculturists the Act were to apply. It will therefore be permissible to refer to the

1. (1961) 2 S.C.J. 443.
2. (1930) 61 M.L.J. 535:I.L.R. (1954) Mad. 845.
3. (1955) 3 All.E.R. 647.
4. (1953) 1 M.L.J. 739 : (1953) S.C.J. 369.

Preamble to ascertain the scope of the statute. As we have stated already the Preamble indicates that the moratorium was intended only to apply to agriculturists owning lands within this State. The operation of the statute, in our opinion, should be restricted accordingly.

It was next contended that for the application of section 5 it would be sufficient if the crditor in good faith thought that the debtor was an agriculturist and it was further not necessary that the latter should actually be one. The learned counsel argued that the appellant was acting in good faith because (1) he believed that the debtor owned lands at Kothamangalam and Neppalpatti. (2) He equally *bona fide* believed that having lands in Pegu would entitle the debtor to take advantage of the moratorium. The question whether the appellant was *bona fide* of opinion that the respondent was an agriculturist is a question of fact depending on the evidence. That plea in regard to that question was not taken in the lower Court. The case of the appellant was that the debtor did own agricultural lands and not that he thought he owned them. It is unnecessary to consider whether a mere mistake of law as to the applicability of the Act in the absence of evidence as to taking advice from competent persons could be said to be a mistake made in good faith. We are of opinion that this belated plea should not be allowed to be raised in the circumstances of the present case.

It follows that the appellant cannot claim the benefit of section 5 of Act V of 1954 and exclude the time during which that Act and the Ordinance preceding it were in force in the computation of the period of limitation for the purpose of section 48, Civil Procedure Code. We therefore agree with the learned Subordinate Judge that the execution application is barred by the provisions of section 48, Civil Procedure Code and dismiss this appeal. There will be no order as to costs.

V.S. *Appeal dismissed*

[END OF VOLUME (1961) II M.L.J. (REPORTS.)]

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